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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1523

DAVID B. SWOAP, as Director of the State Department of Benefit Payments,

Petitioner,

vs.

MARGUARITA GARCIA and PALMIDA CASTANON,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

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SUBJECT INDEX

Page

Petition for a Writ of Certiorari to the Supreme Court of the State of California 1

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Statutory Provisions 2

Federal 2

State 3

Statement of the Case 4

1. Factual Background 4

2. How the Federal Question Is Presented 6

Reasons for Granting the Writ 7

1. Efforts to Reform and Streamline Welfare Administration Cannot Succeed If Federal Policy Options Are Eliminated by State Courts on a Selective and Inconsistent Basis 7

2. The Department of Health, Education and Welfare's Responsibility To Interpret And Implement the Social Security Act Has Been Abrogated Regarding Critical Aspect of Welfare Administration 11

Conclusion 17

TABLE OF AUTHORITIES CITED

Cases	Pages
Dandridge v. Williams, 397 U.S. 471 (1970)	12
Garcia v. Swoap, 60 Cal.App.3d 903 (1976)	1, 6, 7, 9, 13, 14, 15
King v. Smith, 392 U.S. 309 (1968)	8
Lewis v. Martin, 397 U.S. 552 (1970)	8, 12
New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973)	12, 13
Pitts v. Perluss, 58 Cal.2d 824 (1962)	13
Van Lare v. Hurley, 421 U.S. 338 (1975)	8
Miscellaneous	
California Eligibility and Assistance Standards Manual, Sec. 44-315	3
Statutes	
California Welfare and Institutions Code, Sec. 11004	14
California Welfare and Institutions Code, Sec. 11004(e)	14
California Welfare and Institutions Code, Sec. 11450	14
California Welfare and Institutions Code, Sec. 11452	14
45 Code of Federal Regulations, Sec. 233.20(a)(3)(ii)(D)	3, 8
Social Security Act, Sec. 402(a)(7)	2
Social Security Act, Sec. 402(a)(10)	12
Social Security Act, Sec. 406(a)	12
United States Code, Title 28, Sec. 1275(3)	2
United States Code, Title 42, Sec. 601-610	4
United States Code, Title 42, Sec. 602(a)(7)	2

INDEX TO APPENDICES

	Appendix Page
Appendix A. Opinion of the Court of Appeal, Second Appellate District, Division Five, State of California	1
Appendix B. Order of the Court of Appeal, Second Appellate District, Division Five, State of California denying a Petition for Rehearing	17
Appendix C. Order of the Supreme Court of the State of California denying a Petition for Hearing	18
Appendix D. Memorandum of Office of the General Counsel of the Department of Health, Education, and Welfare, and transmittal thereof to petitioner	19

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DAVID B. SWOAP, as Director of the State Department of Benefit Payments,

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MARGUARITA GARCIA and PALMIDA CASTANON,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

Petitioner, David B. Swoap, by his successor Marion J. Woods, Director of the California State Department of Benefit Payments, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five, and the order of the California Supreme Court denying a petition for hearing.

OPINION BELOW

The opinion of the Court of Appeal, Second Appellate District, Division Five, is reported at 63 Cal.App.3d 903 (1976) [134 Cal. Rptr. 137] and also appears as Appendix A attached hereto.

JURISDICTION

The judgment of the Court of Appeal, Second Appellate District, Division Five, was entered on November 17, 1976. A

petition for rehearing was denied December 15, 1976 by that court. See Appendix B attached hereto. On February 3, 1977, the California Supreme Court denied the Director of the Department of Benefit Payments' petition for a hearing. See Appendix C attached hereto.

The instant petition seeks to invoke this Court's jurisdiction pursuant to the provisions of 28 U.S.C. 1275(3) in that the opinion below was based on an erroneous interpretation of federal welfare law that was precisely opposite from the interpretation thereof by the Department of Health, Education, and Welfare, the federal agency lawfully charged with sole administrative and quasi-legislative responsibility therefor.

QUESTIONS PRESENTED

1. Can a State court nullify formal federal (HEW) approval of State agency administration of a technical function requiring specialized expertise upon which State law is silent by failing to acknowledge or give any weight whatsoever to the federal agencies' interpretation of the Social Security Act for which it has sole administrative and quasi-legislative responsibility?

2. In performing the statutory federal mandate to consider outside income of recipients in the Aid to Families with Dependent Children program when computing grants, can a State welfare director be required by a State court to use a case budgeting method based on an estimate of income rather than a method approved by HEW using the most recent actual income data?

STATUTORY PROVISIONS INVOLVED

Federal

1. United States Code, title 42:

Section 602(a)(7) [§ 402(a)(7) of the Social Security Act]:

> "A State plan for aid and services to needy families with children must . . . (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid. . . ."

2. 45 Code of Federal Regulations, section 233.20(a)(3)(ii)(D):

> "net income available for current use and currently available resources shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance;"

State

1. California Eligibility and Assistance Standards Manual section 44-315:

".6 Budget Period

"The budget period for grant computation shall be the calendar month ending not more than 34 days before the first installment of the corresponding payment period. (See Section 44-305.22.)

"The grant for the initial and second calendar months shall be computed on the basis of known or estimated income in each of those two calendar months.

"The grants for the third and subsequent payment periods shall be based on actual income received in the budget period."

".8 Supplemental Payments

"If unusual and unforseen substantial changes in a recipient's income occur, a supplemental payment may be made when necessary to protect the welfare of the child(ren). Supplemental payments shall be limited in any month to the extent that the total grant, together with currently available income, does not exceed the allowable Maximum Aid.

"When a recipient receives a supplemental payment in more than one month, the total of such payments may not exceed the recipient's total net nonexempt income during the first and second months preceding a change in budgeting method used by the country; or during the first and second months for which aid payments are made."

STATEMENT OF THE CASE

1. Factual Background

This action concerns the manner in which welfare grants are computed in one of the major cash assistance programs, Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-610.

Both federal and state law dictate that in computing periodic welfare grant payment amounts, net outside income and resources must be considered. In the case of income, consideration is synonymous with deduction from the statutorily established maximum permissible payment. This principle is not here in question, nor is there at issue any question of the nature of the income considered. There are innumerable rules and guidelines that revolve around exemptions, percentage disregards, and definitional exclusions that are applied to gross income. It is only after application of all of these rules and guidelines that net nonexempt income is considered, or deducted from the statutory maximum permissible payment. It is this resultant amount that is being referred to when the word income is used in connection with welfare case payment budgeting procedure.

Every state must necessarily employ some mechanism to measure recipient income against the grant level to determine the amount of the actual welfare check each recipient periodically receives. Nowhere is it dictated in federal law or regulation, or in state law, precisely how this concededly necessary function is to be performed. Federal law and regulations provide that recipients have a duty to report income, and welfare administrators have a duty to consider it.

In California there are about one and one-half million AFDC recipients who are in about 500,000 families. Case workers maintain case folders for each family, which is treated as an individual family budget unit. Prior to the 10th of each month, every family submits a form report to the welfare department. The report contains, among other things, information about the nonwelfare income, if any, for the family for the past month. The case worker then computes the actual amount of the welfare entitlement by deducting income as appropriate from the grant level for that family. The monthly entitlement thus computed is then disbursed in the form of two equal installment checks on the 1st and 15th of the following month.

A moment's reflection immediately focuses attention on the fact that it is impossible to know the amount of outside income for a given month and factor it into the welfare checks for the same month. When, for example, sometime in June, the computation is made to determine the grant for July, the actual amount of income to be received in July cannot be known unless one resorts to some form—no matter how sophisticated—of guesswork.

Prior to 1972, California used what may be called a "concurrent month" budgeting system. The case worker estimated what the income to the family would be in the month about to begin. The entitlement for the coming month, taking into account the estimate of future income, was then computed accordingly. Because this computation was based on an estimate, errors were frequent, resulting in numerous overpayments and underpayments. To deal with the large numbers of inaccuracies that predictably surfaced after the fact in a following month when the actual amount of income was established, a complicated system of recoupments, offsets, and applications for supplemental checks was utilized to correct the effects of the guesswork employed the month before. This was a constant, continuous, and burdensome appendage to an already complex welfare program.

Commencing in 1972, California began to use a modified system which came to be known as "prior month budgeting" (here-

inafter PMB). When the case worker received the report of income early in June, the *May* income documented therein was used to compute the *July* grant. This is the existing procedure that flows from the state regulations set forth above. *It should be noted that the PMB method HEW approved for use in California has no effect on the determination of need or initial eligibility. The system does not commence until the third month. For the first two months eligibility and grant amount are determined by the "concurrent" method.*

There are two significant differences between PMB and the concurrent method. First, the PMB system deals with known income received in the immediate past rather than estimated income to be received in the immediate future. The errors associated with the guesswork are thus eliminated. Secondly, there exists a short-term opportunity for windfall and/or misfortune when income changes. If income increases, the effect is not factored into welfare checks for two months. The recipient has the temporary benefit of both higher income and an unadjusted welfare check. If income decreases, the effect is potentially the opposite. The recipient would have reduced total income for two months before his welfare check increases were it not for a system of supplements. Many recipients subject to the potential of temporarily decreased total income are eligible for supplementary checks as provided for in the quoted regulation.

With regard to the second difference, however, it should be noted that the windfall or misfortune, if any, associated with PMB could and often did visit itself upon welfare families under the concurrent system formerly used due to mistakes in the monthly prognostications of future income. See concurring opinion, 63 Cal.App.3d at 915, Appendix A, p. 16.

2. How the Federal Question Is Presented

In late 1974, state director Swoap specifically requested that the Department of Health, Education, and Welfare review California's PMB procedure. On December 12, 1974, HEW replied that

the procedure was consistent with its regulation as a matter of law, and that as a matter of policy it was fully endorsed as a proper and efficient method of administration. The opinion of the HEW office of the general counsel and the transmittal of the program administrator were before all levels of the California court system. They are set forth herein as Appendix D for the convenience of this Court.[1]

Respondent Garcia filed suit in Los Angeles County Superior Court on behalf of herself and all whose grants were reduced based on income received in the immediate past. She sought to enjoin the use of prior month budgeting on the ground that it was an unlawful manner of administering the AFDC program. The trial court denied the relief requested and ruled in favor of petitioner herein.

The Court of Appeal, Second Appellate District, Division Five, reversed the trial court decision on the basis of "controlling federal law and policy governing the AFDC program . . . the mandatory requirements established by the Social Security Act, as interpreted and implemented by regulations promulgated by the Department of Health, Education, and Welfare." 63 Cal.App.3d at 909, Appendix A, page 8. Although the interpretation by HEW of its own regulation implementing the act it is charged to administer was before the court and was argued and discussed, no mention or acknowledgment thereof appears in the opinion.

A timely petition for rehearing was denied (Appendix B), and the California Supreme Court denied a hearing (Appendix C).

REASONS FOR GRANTING THE WRIT

I. Efforts to Reform and Streamline Welfare Administration Cannot Succeed If Federal Policy Options Are Eliminated by State Courts on a Selective and Inconsistent Basis

Computation of welfare grants, consideration of outside income and resources, and the constant need for the timely disbursement

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1. HEW refers to the regulation by its former number, 45 CFR section 233.20(a)(3)(ii)(*c*).

of millions of reasonably accurate assistance checks combine to create a technical and logistical problem of almost mind-boggling complexity. It is not surprising that HEW, the agency charged with meeting the most pressing of human needs with as much precision and compassion as government can muster, is the largest bureaucracy in the federal government. The same is true of equivalent agencies at the state level throughout the nation.

The need to reform the way welfare is administered in this country, and the public support of the present effort to do so, has become an almost daily topic of public conversation. The consensus around the need for speedy and comprehensive overhaul of the entire massive system of rules, regulations and guidelines and their sporadic and inconsistent application is too well recognized to require documentation. It is shared by virtually all connected with program administration at every level of government.

This case involving the matching of outside income against a statutory entitlement presents both an excellent example of the need for administrative streamlining, and at the same time a serious threat to the remedial action for which the current situation cries out.

The key to the legal treatment of outside income is obviously in the meaning of the words "available for current use" in the federal regulation 45 C.F.R. § 233.20(a)(3)(ii)(D) set forth above. It is self evident that the administrative logistics of grant computation forces one to face the fact that it is impossible to know the amount of outside income and factor it into the welfare checks all in the same month. One must either resort to estimated assumptions about future income or use the information on hand regarding income received in the immediate past.

There is a well founded proscription against inclusion in the eligibility and grant determination process of sources of income or support that are hypothetical or presumed as opposed to actual or tangible. See e.g. *King v. Smith,* 392 U.S. 309, 329-30 (1968); *Lewis v. Martin,* 397 U.S. 552, 558-60 (1970); *Van Lare v.*

Hurley, 421 U.S. 338, 345-46 (1975). That fact was acknowledged by the court below. 63 Cal.App.3d at 909-10, Appendix A, p. 9. However, that court also acknowledged that " . . . It is true that the federal regulation does not prohibit a welfare agency from considering income other than that which is in the recipient's pocket at the time of the current grant in computing the amount of the payment. . . ." 63 Cal.App.3d at 913, Appendix A, p. 13.

Having noted that grant computation requires a mechanism more sophisticated than counting cash on hand once a month and that availability of income cannot be taken too literally without producing an absurd and impossible result, the problem before the court became one of harmonizing the law with the realities of the technical logistical problems of welfare administration. This the court utterly failed to do. In marked contrast to the trial court whose proceedings it was reviewing, the appellate court attempted to solve the dilemma it dimly perceived (see concurring opinion, 63 Cal.App.3d at 915, Appendix A, pp. 15-16) by totally ignoring the expertise and opinions of the responsible executive agencies, state and federal, on an extremely technical and cumbersome, but critical, administrative function. It must be emphasized that we are not only addressing a failure to follow the federal agency opinion on a federal question on grounds of disagreement, but also a failure to even acknowledge its existence.

The opinion struck down the procedure now in use, which embodied HEW's and petitioner's opinion that the measuring period defining "available for current use" is not subject to a rigid specification, but does reasonably admit of a case budgeting methodology whereby income received in the last complete month can be counted against the payment level in the next complete month as long as no income is double counted or ignored, thus permitting the use of the latest available actual information

rather than estimates, presumptions or guesswork. See Appendix D. That view was not lightly or capriciously arrived at, but was a result of a careful weighing and balancing of many factors including those alluded to herein.

Having eliminated the preferred methodology without even acknowledging the considerations behind its approval and endorsement, the court left no usable guidance as to alternatives. It is impossible to speculate as to how the court would in further proceedings inform petitioners what its holding means without creating a conflict not only with decisions of this Court but with federal welfare law in the rest of the nation.

California's consternation with this state of affairs, however, is not the point here. The question that must be asked is how we are ever to approach a more sensible and uniform way of administering welfare. Let us assume a desire to make some form of prior month budgeting a nationwide practice in the interest of accuracy, consistency and lower administrative overhead, not at all a far-fetched proposition given HEW's present views. Shall the courts of every state feel free to ignore the opinion of the cognizant administrative agency and come to their own conclusions about the technical matter of welfare case budgeting practices? Is there any limit to the number of technical administrative issues that are subject to a similar fate? The welfare machinery is not running smoothly now. How much sand can we throw into it and still expect it to function as we contemplate reforms?

Unless certiorari is granted and the decision below is vacated, there can be no assurance that all hope of repairing and streamlining the welfare system will not be lost before the effort is seriously begun. It is impossible to even speculate as to how many federal options will be foreclosed in this way, perhaps in some states, perhaps not in others, and how many among a myriad of possible alternatives might be substituted therefor. Should this decision stand, it will be a constant warning to all concerned

with welfare administration and reform that any state court can at any time ignore the expertise of not only its own administrative agency, but that of HEW in the role of custodian of the Social Security Act as well; and on federal questions upon which state law is silent.

We are now faced with the fact that an important welfare administrative policy option favored by HEW is foreclosed in the nation's largest state. The situation elsewhere is now uncertain. The point being made here is not that the views of administrative agencies are sacrosanct, or that their actions ought not to receive appropriate judicial scrutiny. The point is that unless the judicial review function is performed properly according to rules long articulated by this and other courts, including California's, the entire nation's welfare programs will suffer crippling limitations upon efforts toward badly needed comprehensive restructuring.

II. The Department of Health, Education and Welfare's Responsibility to Interpret and Implement the Social Security Act Has Been Abrogated Regarding a Critical Aspect of Welfare Administration

It has long been well established that in reviewing the actions of the government, courts should not substitute their judgment for that of an administrative agency that acts in a quasi-legislative capacity regarding a technical and complex subject matter, absent a showing of arbitrary and capricious action. This Court has recognized the wisdom of this general rule many times and has applied it in specific instances regarding HEW's responsibility for welfare administration.

The portion of the Social Security Act dealing with welfare is written in broad and general terms. Although programs have proliferated and grown more complex over a period of some 40 years due to both legislative action and the increasing need to accommodate formal process into program functioning, through

all the years of change there has been one constant characteristic. The AFDC program has always been operated as a scheme of cooperative federalism, characterized by deference to HEW's interpretation of the Social Security Act, and broad latitude to states in allocating scarce resources among many competing priorities through a variety of acceptable administration delivery systems. See *New York State Dept. of Social Services v. Dublino,* 413 U.S. 405, 413 (1973) and cases there cited.

For example, section 406(a) of the Social Security Act was interpreted by HEW to mean that only income from a natural or adoptive father and not an unrelated adult male is actually available for the support of the minor children of the caretaker mother. California in that instance was contending that the income of a man assuming the role of spouse should be held to be available to the children. This Court gave HEW the deference due the agency charged with administration of the Act and held that agency's interpretation valid, rejecting California's proffered alternative construction. *Lewis v. Martin, supra,* 397 U.S. 552, 557-560 (1970).

In *Dandridge v. Williams,* 397 U.S. 471 (1970), HEW had approved Maryland's allocation of resources to its recipients based on a system of maximum grants, which had the effect of reducing per capita aid for large families based on the rationale of economics of scale. This Court, in upholding the State program approved by HEW in its interpretation of section 402(a)(10) of the Social Security Act, noted that the problem of allocating limited funds for the maintenance of the dependent poor was complex and could be handled in a myriad of ways and that those responsible for so doing were to be accorded considerable latitude in policy and methodology. 397 U.S. at 478-482.

In *New York State Dept. of Social Services v. Dublino, supra,* 413 U.S. 405 (1973), this Court exhaustively addressed the complex problem of the relationship of work incentive and training

provisions to welfare eligibility. Great weight was placed on HEW's responsibility for administering the Social Security Act and its interpretation of that Act as not precluding approval of AFDC State plans containing work requirements. The New York plan was approved, this Court stating once again that ". . . the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ." 413 U.S. at 420-421.

This general principle is likewise deeply embedded in California law, a fact which was acknowledged below. 63 Cal.App. 3d at 908-909; Appendix A, p. 7; *Pitts v. Perluss,* 58 Cal.2d 824, 832 (1962).

The many possible ways of dealing with the technical problem of matching outside income of recipients against maximum permissible grant entitlements is hinted at by the difficulties encountered by the court below, and illustrated by HEW's analysis of the problem, which observes:

"With respect to the first issue, this Office issued an opinion on June 7, 1973, specifically approving prior month budgeting. That opinion stated, in pertinent part, as follows:

" 'A literal reading of the language in 45 CFR section 233.20(a)(3)(ii)(c) would mean that unless the individual has his total income in hand when the assistance check is issued (or maybe even received), that income may not be deducted in determining the amount of his grant. This would mean that the only time income could be counted would be when it was received at the same time the assistance check was issued (or received). Otherwise the agency would be counting income that the individual had spent (or at least begun to spend) and that was no longer available to him. This ridiculous result was clearly not intended by the regulation.

" 'On the contrary, the regulation was intended to preclude the consideration or income that was, in fact, never

available to the individual, or that had not been available to him for a substantial period of time . . . .

" 'In fact, States have been permitted considerable administrative latitude in determining the period for which income is reflected in the assistance grant, with the result that income is not always (indeed, is not usually) deducted from the assistance check for the month the income is received . . . .' " Appendix D, p. 21.

It must be noted that HEW in its transmittal to petitioner was not mandating the use of the prior month budgeting method. It was approving the use thereof as a preferred option among others. Appendix D, p. 1. Had the court below held that the Social Security Act permitted the option of prior month budgeting but that petitioner herein was constrained from selecting that option in California, this particular reason for granting the writ would be less forceful.

However, the court was quite plain in its holding that PMB was invalidated because it was perceived to constitute a violation of the Social Security Act and HEW's regulation. 63 Cal.App.3d at 909, Appendix A, p. 8. State law is mentioned in only a peripheral fashion. The court alludes to certain state statutes concerning recoupment (Welf. & Inst. Code § 11004) and the State's standard of need and payment level (Welf. & Inst. Code §§ 11450 and 11452). It is plain beyond question, however, that State law is silent on the question of the method of computation of payment amounts. In fact, section 11004(e) specifically refers to computation of available resources " . . . according to the department standard. . . ." 63 Cal.App.3d at 911, fn. 10, Appendix A, p. 11. State welfare administration is structured like the federal system in this regard. Welfare case payment budgeting methodology is left by the Legislature to the administrative agency.

The question of when income is legally available for purposes of grant payment computation is central and critical in welfare

administration, not only in terms of State and national program budget planning, but as a matter of the program's effect on case workers and on recipients in literally millions of day-to-day transactions. As the HEW opinion above quoted from indicates, constructions of the phrase "available for current use" can range from the literal absuridity of a constant and continuous counting of cash on hand to a definition based on an accrual formula similar to that used by the Internal Revenue Service in computing the more complex tax obligations.

Respondents herein have contended for a determination that no income can be deducted from the maximum statutory entitlement unless it is actually in hand. Strained toward its breaking point, this leads inexorably to the unworkable conclusion that the presence of any money income must be verified monthly, weekly, daily, or as each bill or mealtime approaches, to determine availability to meet current needs. The court below did realize it could not accept this contrived interpretation. 63 Cal.App.3d at 913, Appendix A, p. 13.

The court, however, did not deal at all with any of the reasons that impelled the nation's two largest welfare agencies toward the favoring of prior month budgeting (PMB). Respondents at all stages of the proceedings and also the court below seemed obsessed with the notion that the government agencies involved were attempting to save grant costs at the recipient's expense. At no time whatsoever has program cost, grant level, or income amount been an issue in this litigation. Petitioner does not claim that grant costs will rise if PMB is not maintained.

The virtues of the system lie in another direction. Accuracy, certainty, and predictability are greatly enhanced because actual data is used instead of guesswork. Most of the hardship and trauma connected with constant adjustment and recoupment to repair the effects of faulty estimating is eliminated. *Administrative* costs, as opposed to grant costs, are reduced and the resultant savings of public funds make greater program enrichment attain-

able. These are things upon which petitioner as director of an agency serving needy people, places a high value.

When the court below chose to ignore the sound counsel of this and other tribunals and substitute its judgment for that of the administrative agencies on a technical matter, it was not only errors in logic and legal consequences that predictably followed, but the loss of the court's ability to blend the social objectives of the AFDC program with valuable advice on what is in fact accomplishable in the field. This petitioner and HEW have sought to do.

HEW has not here stricken down any particular type of budgeting system in favor of another. It has ruled, by regulation and by interpretation thereof, that California's PMB system is consistent with its regulation, and as a matter of policy is a preferred option. The court below chose to ignore the opinion of the agency charged with sole administrative and quasi-legislative responsibility for the subject matter, an opinion required by law to be viewed as the most authoritative. The omission is the more glaring because the existence of HEW's opinion was not even acknowledged. That opinion was not merely the most authoritative judgment, but the *only* judgment on question before the court.

HEW's interpretation of the Social Security Act on a vital question concerning welfare administration will not be applicable in California, with over 12% of the nation's caseload, unless certiorari is granted. There is also now a serious question in the other states that use prior month budgeting and also in another group of yet other states desiring to switch to prior month budgeting for the same reasons petitioner and HEW have favored it. Those states cannot proceed with any degree of certainty unless they know that HEW's interpretation of its own regulation is authoritative and will be given the weight that is its due, or at least will be applied in a uniform and ascertainable way. Uniformity can now be accomplished only by a grant of certiorari in this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the California Court of Appeal, Second Appellate District, Division Five.

Respectfully submitted,

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(Appendices Follow)

Appendix A

[Civ. No. 47086. Second Dist., Div. Five. Nov. 17, 1976.]

MARGUARITA GARCIA et al., Plantiffs and Appellants, v. DAVID B. SWOAP, as Director, etc., Defendant and Respondent.

SUMMARY

In a class action against the Director of the State Department of Benefit Payments, recipients of the Aid to Families with Dependent Children (AFDC) program, challenged the validity of a regulation known as "Prior Month Budgeting," under which an AFDC grant for the current month is calculated on the basis of the net nonexempt income that is received two months prior to the actual payment of the grant. By application of the regulation, plaintiffs had their AFDC grants reduced to reflect income received in prior months, but which was not available when the grant was paid. Plaintiffs contended that the prior month budgeting scheme was contrary to state and federal law, and in particular was in direct conflict with the purpose of AFDC, which was to provide for the current needs of dependent children, and with a federal regulation requiring that grants to needy families be based on currently available income and resources. The trial court denied the prayer for a preliminary injunction, and judgment was entered for defendant. (Superior Court of Los Angeles County, No. 47086, David N. Eagleson, Judge.)

The Court of Appeal reversed and remanded for further proceedings holding the regulation imposing a system of prior month budgeting for the computation of AFDC assistant payments to be invalid. The Court, noting that the primary and almost exclusive purpose of the AFDC program was the protection of dependent children through the provision of assistant payments to meet their current needs, held the prior month budgeting regulation violated standards establishing that a state welfare agency may not presume that income is in fact available to the needy family

whether the income is only a hypothetical one, or whether the income was actually received, but in a past payment period, and further that a dependent child cannot be punished, through the reduction of assistance grants, for parental mismanagement of income. (Opinion by Stephens, J., with Hastings, J., concurring. Separate concurring opinion by Kaus, P. J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a, 1b) Public Aid and Welfare § 30—Aid to Families With Dependent Children—Determination of Eligibility and Aid; Judicial Review.—A state regulation for "Prior Month Budgeting," providing that an Aid for Families With Dependent Children grant for the current month is calculated on the basis of the nonexempt income that is received two months prior to the actual payment of the grant, was invalid as being in direct conflict with the purpose of the program, which is to provide for the current needs of dependent children, and with a federal regulation requiring that grants to needy families be based on currently available income and resources. In order to be in compliance with state and federal law, an aid for dependent children budgeting system should, at a minimum, consider income in the same month or within a 31-day period in which assistance payments are to be made. Furthermore, the deficiencies in the prior month budget system could not be alleviated simply by the application of an emergency payment or supplemental payment provision. However, if the regulation should be amended so as to provide payments to protect the children, the system would then comply with federal regulations.

[See Cal.Jur.2d, Social Security and Retirement Funds, § 29; Am.Jur.2d, Welfare Laws, § 19.]

(2) Administrative Law § 115—Judicial Review—Scope and Extent—Presumptions; Regularity; Validity of Rules and Regulations.—In reviewing an administrative regulation, an appellate

court cannot superimpose its own policy judgment upon that of a state administrative agency which acts in a quasi-legislative capacity.

(3) Public Aid and Welfare § 2—State and Federal Legislation—Regulations.—A state welfare administrator may not operate welfare programs which alter, impair, or impede their statutory schemes, and, to the extent that a regulation is inconsistent with controlling state and federal statutes, fundamental principles of administrative law require that it be declared invalid, and its further operation may properly be enjoined.

(4) Public Aid and Welfare § 26—Aid to Families With Dependent Children—State Compliance With Federal Law.—States which qualify for Aid to Families With Dependent Children funding and which elect to participate, must comply with the mandatory requirements established by the Social Security Act, as interpreted and implemented by regulations promulgated by the Department of Health, Education and Welfare.

(5) Public Aid and Welfare § 26—Aid to Families With Dependent Children—Purpose.—The Federal Aid to Families With Dependent Children program was designed to provide welfare for families without a "bread winner," "wage earner," or "father," a need unfulfilled by other welfare programs. As such, it has as its primary and almost exclusive purpose the protection of such dependent children through the provisions of assistance payments to meet their current needs. The state welfare agency may not frustrate that purpose to advance otherwise valid concerns such as state fiscal and deterrent objectives.

COUNSEL

Daniel M. Luevano, Rosalym M. Chapman, Philip L. Goar, Dorothy T. Lang, Warren Weinstein and Ronald S. Javor for Plaintiffs and Appellants.

Evelle J. Younger, Attorney General, Ronald V. Thunen, Jr., and Ronald Gold, Deputy Attorneys General, for Defendant and Respondent.

OPINION

Stephens, J.—In a class action against the Director of the State Department of Benefit Payments (Department) plaintiffs and appellants challenged the validity of a department regulation in a complaint for injunctive and declaratory relief. The preliminary injunction was denied, and judgment was entered for the defendant. Plaintiffs then entered the instant appeal.

Facts

Plaintiffs Marguarita Garcia and Palmida Castanon, represent themselves and a class of persons who are recipients of the Aid to Families With Dependent Children (AFDC) program. The administrative regulation challenged by them, EAS 44-315.6, provides as follows:

"Budget Period

".61 The budget period in counties without an approved alternate payment system:

".611 The budget period for AFDC-FG and AFDC-U cases shall be the second prior calendar month before the first installment of the corresponding payment period.

". . . . . .

".62 The budget period in counties with approved alternate payment systems:

".621 The budget period for AFDC-FG and AFDC-U cases shall be a 28 to 31-day period ending not more than 31 days nor less than 28 days before the first installment of the corresponding payment period. The budget period is not limited to a calendar month."

Under the instant regulation, known as "Prior Month Budgeting," an AFDC grant for the current month is calculated on the basis of the net nonexempt income that is received two months prior to the actual payment of the grant.[1] Since the budget period precedes the payment period by two months, a grant in April is based on a recipient's February income, a grant in May is based on March income, and so forth. All AFDC recipients are required to submit a monthly report of all income received during the budget period. In the intervening month between the budget period and the payment period, the County Welfare Department computes the welfare grant based upon that reported income, and issues the grant at the start of the payment period.

Appellant Garcia and her four children received an AFDC check for $355 in July 1974.[2] For the four preceding years, her only source of support was the AFDC program. In both June and July 1974, she received, in addition to the AFDC grant, $200 in child support from her ex-husband. No child support money was received in August or September. She reported the income to her caseworker on the two occasions that she received it, but claims that her caseworker never told her that the income would be used to lower her AFDC grant two months later. In August and September her AFDC grant was reduced $155 to reflect her June and July income. Appellant Garcia had no other available income in August or September other than the AFDC grant since the child support payments received in June and July had been spent on past due bills.

In July 1974, Mr. Castanon was residing with his wife and child and earned from part-time work net nonexempt income of approximately $250. Appellant Castanon declares that her hus-

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1. Because the budget period precedes the payment period by two months, Prior Month Budgeting cannot commence for a new recipient until the third month of receipt of AFDC.

2. No evidence was adduced at trial, and findings of fact were waived. The record consists solely of the complaint, answer, exhibits thereto, and three declarations.

band spent all of the income in July by contributing $180 toward his father's funeral and the remainder on his own personal needs. In August, Mr. Castanon left his family and has not returned; appellant's grant was reduced to $86 to reflect Mr. Castanon's July income.

Contentions

Appellants Garcia and Castanon contend, on behalf of themselves and the class of welfare recipients receiving aid under California's AFDC program, that the Prior Month Budgeting scheme (PMB) is contrary to state and federal law and that the regulation which implemented this scheme (EAS 44-315.6) is therefore beyond the rule-making authority of the Director of Benefit Payments. (1a) In particular, appellants claim that the PMB regulation is in direct conflict with the purpose of AFDC—to provide for the *current* needs of dependent children, and with a federal AFDC regulation (45 C.F.R. § 233.20(a)(3)(ii)(D)) requiring that grants to needy families be made based on currently available income and resources. It is further claimed that the PMB system contravenes California statutes setting minimum aid standards (Welf. & Inst. Code, § 11450) and limiting reductions of current grants to effect recoupment for prior overpayments (Welf. & Inst. Code, § 11004).

Discussion

Before reaching appellants' objections to California's current AFDC budgeting scheme we note that there may be an independent ground for reversal of the judgments against Mrs. Garcia and Mrs. Castanon. At the time of trial, the federal "income and resources" regulations then in effect allowed consideration only of "such net income as is actually available for current use *on a regular basis*" in determining the amount of AFDC assistance. (45 C.F.R. § 233.20(a)(3)(ii)(C), effective

January 29, 1969; italics added.)[3] By implication, nonregular or sporadic income was not to be considered by the welfare agency. Clearly, Mrs. Garcia's income could have been classified as "sporadic," though it is not clear that the part-time earnings of Mr. Castanon could have been so classified. Thus, Mrs. Garcia's reduction of payment could be attributed not to the operation of PMB, but rather to the possibly erroneous consideration of sporadic income in reducing a subsequent assistance grant. But because Mrs. Castanon's complaint more likely arises from the operation of the PMB system itself, we cannot avoid an evaluation of such a system in this appeal. Further, since the income and resources regulation has since been amended to delete the regular income restrictions (45 C.F.R. § 233.20(a)(3)(ii)(D), effective August 1, 1975)[4] cases such as Mrs. Garcia's will properly come within the scope of PMB, and in such cases the lower court will need our guidance as to the propriety of injunctive relief.

(2) In reviewing the Prior Month Budgeting regulation we recognize that we cannot superimpose our own policy judgment upon that of a state administrative agency which acts in a quasi-legislative capacity. (*Pitts v. Perluss*, 58 Cal.2d 824, 832 [27 Cal. Rptr. 19, 377 P.2d 83].) But the latitude which an administrator has in implementing a state and federal statutory scheme is not unlimited. (3) It is well settled that a state welfare administrator may not operate welfare programs which alter,

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3. That clause provided that in establishing the amount of AFDC assistance, "only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; . . ."

4. This clause now reads as follows: ". . . net income available for current use and currently available resources shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance; . . . ."

impair, or impede their statutory schemes (*Morris* v. *Williams,* 67 Cal.2d 733, 748 [63 Cal.Rptr. 689, 433 P.2d 697]; see also *California Welfare Rights Organization* v. *Carleson,* 4 Cal.3d 445, 458 [93 Cal.Rptr. 758, 482 P.2d 670]; *Daley* v. *State Dept. of Social Welfare,* 276 Cal.App.2d 801, 804 [81 Cal.Rptr. 318]), and it is this court's obligation to strike down regulations effectuating such welfare operations. (*Morris* v. *Williams, supra.*) Thus, to the extent that the PMB regulation is inconsistent with controlling state and federal statutes, fundamental principles of administrative law require that it be declared invalid, and its further operation may properly be enjoined. (See *Cooper* v. *Swoap,* 11 Cal.3d 856, 864-865 [115 Cal.Rptr. 1, 524 P.2d 97].)

We proceed now to an evaluation of the controlling federal law and policy governing the AFDC program. (4) Initially we note that states which qualify for AFDC funding and which elect to participate, must comply with the mandatory requirements established by the Social Security Act, as interpreted and implemented by regulations promulgated by the Department of Health, Education and Welfare. (*Ogdon* v. *Workmen's Comp. Appeals Bd.,* 11 Cal.3d 192, 199 [113 Cal.Rptr. 206, 520 P.2d 1022]; *County of Alameda* v. *Carleson,* 5 Cal.3d 730, 739 [97 Cal.Rptr. 385, 488 P.2d 953].) Title IV of the Social Security Act, 42 United States Code, section 602(a)(7), requires that a state AFDC plan "must . . . provide that the state agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid. . . ." The regulation adopted pursuant to this directive provides that "net income [actually] available for current use" shall be considered in determining need and the amount of assistance. (45 C.F.R. § 233.20(a)(3)(ii)(D).) Once a family is found to be eligible for AFDC assistance the federal statute further requires that aid to dependent children "be furnished with reasonable promptness. . . ." (42 U.S.C. § 602(a)(10).)

(5) The federal AFDC program was designed to provide welfare for families without a "breadwinner," "wage earner," or "father," a need unfulfilled by other welfare programs. (*King* v. *Smith,* 392 U.S. 309, 328 [20 L.Ed.2d 1118, 1131-1132, 88 S.Ct. 2128].) As such, it has as its primary and almost exclusive purpose the protection of such dependent children through the provision of assistance payments to meet their current needs. (42 U.S.C. § 601 (1970)); *King, supra,* at p. 325 [20 L.Ed.2d at p. 1130]; see *Rodriguez* v. *Vowell* (5 Cir. 1973) 472 F.2d 622, 627.)[5] It has been recognized, in addition, that a state welfare agency may not frustrate this purpose to advance otherwise valid concerns such as state fiscal and deterrence objectives.[6] (See *King, supra,* at p. 320 [20 L.Ed.2d at p. 1127].) Two corollaries have developed out of these principles: first, cases interpreting the "income and resources" regulations (45 C.F.R. § 233.20(a)(3)(ii)(D)) have all recognized that the state welfare agency may not *presume* that income is in fact available to the needy family whether the income is only a hypothetical one (e.g., *King, supra,* at p. 319, n. 6 [20 L.Ed.2d at pp. 1126-1127]; *Van Lare* v. *Hurley,* 421 U.S. 338 [44 L.Ed.2d 208, 95 S.Ct. 1741, 1747]), or whether the income was actually received, but in a past payment period. (*National Welfare Rights Organization* v. *Weinberger* (D.D.C. 1974) 377 F.Supp. 861, 868.) Second, cases interpreting the

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5. The AFDC program was enacted "for the purpose of encouraging the care of dependent children in their own homes . . . by enabling each state to furnish financial assistance and rehabilitation and other services, . . . to needy dependent children. (42 U.S.C. § 601 (1970).)

6. Among such objectives are the following: promotion of fiscal integrity; recovery of overpaid funds to those who might otherwise be deprived of aid; deferrence of fraudulent claims; and removal of the stigma of an uncontrollable "handout" program." (See *Note, Due Process and Statutory Limitations on AFDC Recoupment Procedures* (1974) 74 Colum.L.Rev. 1464, 1475-1476.)

federal recoupment regulation (45 C.F.R. § 233.20(a)(12)(i))[7] have established that the dependent child cannot be punished (through the reduction of assistance grants) for parental mismanagement of income. (*Hagans* v. *Wyman* (E.D.N.Y. 1975) 399 F.Supp. 421, 425; *Cooper* v. *Laupheimer* (E.D. Pa. 1970) 316 F.Supp. 264, 269.)[8]

A close analysis of the Prior Month Budgeting scheme reveals several basic shortcomings in light of the foregoing standards. In actual operation PMB is little different from its precursor, concurrent month budgeting,[9] in cases in which family income remains constant—either at a low level, or at the zero level. As long as income remains static no hardship is suffered by a family receiving a current assistance grant based on its financial status two calendar months earlier. However, in cases in which AFDC families receive sporadic income in one month (the Garcia case), or where an income source which was available one month has since ceased to be available (the Castanon case), the vagaries of this system of retrospectively applied payments become apparent.

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7. Since *National Welfare Rights Organization v. Weinberger, supra,* 377 F.Supp. 861, the federal recoupment regulation was modified to prohibit recoupment in cases in which the family has insufficient funds on hand to make up for a reduced grant. The *Weinberger* court declared the existing federal recoupment regulation invalid since it was based on the conclusive presumption that overpayment funds were currently available even though spent prior to the time of recoupment. (*Id.,* at p. 868.)

8. *Cooper, supra,* 316 F.Supp. 264, cites four remedies short of reducing assistance payments in such situations: "[1] [T]he state may provide guidance and counseling services regarding the proper use and management of AFDC funds, 42 U.S.C. § 605; [2] it may provide for protective payments, 42 U.S.C. § 606(b)(2); [3] it may appoint a guardian or legal representative to receive and manage the funds for the child, 42 U.S.C. § 1311; or [4] it may remove a child from a home upon a judicial determination that the parent is not using the funds for the benefit of the child, 42 U.S.C. §§ 605, 608(a)(1). Only if the state provides other care and assistance can it withhold AFDC aid from a needy, dependent child. 42 U.S.C. § 604(b)."

9. Under concurrent month budgeting in use in California prior to the adoption of PMB in 1972, receipt of income in one month affects assistance payments in the same month.

In the case of sporadic income, Prior Month Budgeting can be viewed as a streamlined form of recoupment—struck down in *Weinberger, supra,* in contravention to the fundamental policy of providing for the current needs of the dependent child, and in violation of the current AFDC recoupment regulations. (45 C.F.R. §233.20(a)(12)(i).) In this respect, PMB also avoids the specific recoupment limitations set forth in Welfare and Institutions Code section 11004, which parallel the federal standards.[10] Both federal and estate recoupment provisions proscribe the reduction of a subsequent assistance payment in the amount of a prior overpayment unless the recipient has sufficient income or resources available to meet the current needs of the needy child. (45 C.F.R. § 233.20(a)(12)(i)(A)(1); Welf. & Inst. Code,

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10. Subdivision (c) and (e) of the Welfare and Institutions Code provide as follows:

"(c) Any person who makes full and complete disclosure of those facts as explained to him pursuant to subdivision (a) is entitled to rely upon the award of aid as being accurate, and that the warrant he receives correctly reflects the award made, except that the county paying the aid shall be allowed a period of six months following the month of payment, or six months following the hearing provided in subdivision (e), within which to adjust any errors or changes in amount of grant resulting from changes in income or need which occur too late to be reflected in the grant of the current month. Whenever possible, adjustments or overpayments shall be prorated evenly over the adjustment period.

"(e) Current grants may be reduced because of prior overpayments only if the recipient has income or resources available in the amount by which the county proposes to reduce payment except; that where there is evidence which clearly establishes that a recipient willfully withheld information about his income or resources, such income or resources may be considered in the determination of need to reduce the amount of the grant in current or future periods. Prior to effecting any reduction of current grants to recover prior overpayments, the recipient shall be advised the proposed reduction and of his entitlement to a hearing on the propriety of the reduction. *In no event shall the grant to a needy child be reduced unless the parents or other responsible persons have sufficient available resources or income to meet the current needs of the needy child according to the department standard during the period of reduction.*" (Italics added.)

§ 11004, subd. (e).) Subdivision (e) of section 11004 is clearly worded to protect the children in these situations, while regulation EAS 44.315.8 (fn. 11) is designed to alleviate the problem and is not mandatory. We emphasize this point because it is believed that Prior Month Budgeting is a helpful and, if properly applied, reasonable method for computing welfare grants. The *regulation* should be amended so as to provide payments to protect the children. If this were accomplished, the PMB system would then comply with federal regulations. However, as PMB is presently applied, a prior "overpayment" occurs under these recoupment provisions when income is received in a particular month but is not reflected in the assistance grant for that month. (See *Oliva* v. *Swoap,* 59 Cal.App.3d 130, 137 [130 Cal.Rptr. 411].) In the guise of "retrospectively applied assistance payments," PMB provides for the same sort of correction for "overpayment" in instances of sporadic family income, but *without* the concomitant protective feature which assures that the child's current needs will not go wanting. In Mrs. Garcia's case, an isolated $200 child support payment received in June, together with a full AFDC payment that month, was the basis for an "automatic" $200 reduction in her AFDC grant for August, despite the fact that, in the interim, the "extra" funds were no longer available (having been spent on past due bills). Mrs. Garcia and her four children were thus left with $155, well below subsistence standards,[11] on which to survive the month. It is this very result which is explicitly prohibited in both state and federal AFDC law and policy, no matter what characterization the budgeting system is given.

In other than sporadic income cases, the PMB system suffers from similar shortcomings, although the analogy to recoupment

11. Welf. & Inst. Code, § 11452. The provision sets the subsistence standards for AFDC families according to the number of needy persons in the family.

may no longer apply. As an example, consider the situation in which an AFDC recipient has a regular income which, in January, suddenly ceases. The last month for which income was available is used, under PMB, to compute the AFDC payment two months later. Thus, the March grant reflects a reduction from the full AFDC payment in the amount of the January income, even though the recipient has been without any income for over a month, and even though the January income has been spent prior to the current grant or was never available to the child (as in the case of Mrs. Castanon). Here again, the disparity between current need and current, though retrospectively applied, payment is impermissible under federal AFDC law. (See 45 C.F.R. § 233.20(a)(3)(viii); *Cooper* v. *Laupheimer, supra,* 316 F.Supp. 264, 269.) Whether PMB is viewed in this instance as entertaining a presumption of current availability of past income, or as effectively punishing the needy child for parental mismanagement of funds, it is fundamentally at odds with AFDC policies and provisions.

Respondent insists that Prior Month Budgeting is a reasonable means of computing aid and is consistent with state and federal law. Specifically, he claims that the latitude allowed the states in computing AFDC grants (*Jefferson* v. *Hackney,* 406 U.S. 535, 545 [32 L.Ed.2d 285, 295, 92 S.Ct. 1724]), has not been exceeded in the adoption of the PMB regulation since PMB is far more accurate in this regard than its predecessor—concurrent month budgeting, and since it takes into consideration only such income as is actually available for current use as specified by federal regulation. While it is true that PMB does not suffer from the defect suffered by several budgeting methods which consider "hypothetical" income, we cannot agree with respondent's contention that the income considered under PMB is available for current use. It is true that the federal regulation does not prohibit a welfare agency from considering income other than that which is in the recipient's pocket at the time of the current grant in computing the amount of the payment. However, the disparity

permitted between current need and current payment cannot be countenanced when such payment is based upon income earned *two months earlier,* even where such a system may promote administrative efficiency or conserve public funds. (See *King* v. *Smith, supra,* 392 U.S. 309, 320 [20 L.Ed.2d 1118, 1127].) Current AFDC payments must be made to meet the *current* needs of the dependent child. (*Cooper* v. *Laupheimer, supra,* 316 F.Supp. 264, 269.) Whether the income used to compute aid is no longer available at the time of payment because it was spent or because it was never actually available, as in Mrs. Castanon's case, the child cannot, in effect, be punished by the reduction of AFDC assistance. (*Hagans* v. *Wyman, supra,* 399 F.Supp. 421, 425; *Cooper* v. *Laupheimer, supra,* at p. 269.) Such a system not only ignores the currency requirements for the consideration of income, but also the practical economic realities facing AFDC families, who, living at bare subsistence levels, cannot be expected to budget sporadic income for a payment period two months in the future.

An AFDC budgeting system, to be in compliance with state and federal law, should, at a minimum, consider income in the same month or within a 31 day period in which assistance payments are to be made. The inherent inaccuracies in the concurrent month budgeting system, to the extent that income must be estimated, can be quickly adjusted through the provisions of Welfare and Institutions Code section 11004. The vagaries in the existing PMB system, apparent in such cases as those of Mrs. Garcia and Mrs. Castanon, cannot be alleviated simply by the application of an emergency payment or supplement payment provision.[12] Rather, the goal of conservation of public funds can

12. We reiterate that the basic design of Prior Month Budgeting, though it works hardship in only a few instances, is incorrect. Further, the supplemental payment regulation is purely discretionary in its application. That regulation, EAS 44.315.8, provides as follows:

"If unusual and unforeseen substantial changes in a recipient's income occur, a supplemental payment may be made when necessary to protect the welfare of the child(ren). Supplemental payments shall be limited in any month to the extent that the total grant, together with currently available income, does not exceed the allowable Maximum Aid.

"When a recipient receives a supplemental payment in more than one month, the total of such payments may not exceed the recipient's total net nonexempt income during the first and second months preceding a change in budgeting method used by the county, or during the first and second months for which aid payments are made."

be enforced in conjunction with a concurrent month budgeting system through the application of civil sanctions against the parent or guardian and through programs which encourage the proper management of income.

Accordingly, we hold regulation EAS 44-315.6, imposing a system of prior month budgeting for the computation of AFDC assistance payments, to be invalid.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

Hastings, J., concurred.

KAUS, P. J.—I reluctantly concur in the result as applied to these particular plaintiffs. I feel, however, compelled to express certain reservations:

(1) As footnote 1 of the court's opinion indicates, Prior Month Budgeting (PMB) does not go into effect until the third month after payments commence. Therefore, for the first two months of eligibility the recipient receives a full grant without deduction for additional income during either month. The federal requirement is that payments begin "with reasonable promptness . . . ." Obviously, if a state cannot recoup overpayments necessarily made because of the impossibility of making immediate payments that reflect additional income not yet in the hands of the recipient, the pressures to give an elastic interpretation to the "reasonable promptness" requirement may prove irresistible. Thus, while

taking care of the problems of these plaintiffs, the net effect of our opinion may not be beneficial to welfare recipients in general.

(2) Without expressly disagreeing, I wish to disassociate myself from the court's discussions of Mrs. Garcia's problems under the former regulation referring to ". . . income . . . actually available for current use *on a regular basis* . . . ." Quite arguably this regulation intended to withdraw from consideration only true windfalls, but not child support payments which should be regularly paid, even if they are not.

(3) If current law compels the result which we reach in this case—as I agree it does—I am not nearly as sanguine as the court that "the inherent inaccuracies in the concurrent month budgeting system . . . can be quickly adjusted through the provisions of Welfare and Institutions Code section 11004." I suspect that the result of this opinion will not be a return to concurrent month budgeting but rather an attempt to scuttle, insofar as permissible, the present "pay now, recoup later" scheme.

Appendix B

In the Court of Appeal of the State of California
Second Appellate District
Division Five

MINUTES OF DIVISION FIVE
DECEMBER 15, 1976

GARCIA VS. SWOAP
2d CIVIL 47086

THE COURT: PETITION FOR REHEARING IS DENIED.

[Clerk's Stamp Certification]

Appendix C

ORDER DUE
February 15, 1977

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, Civ. No. 47086

In the Supreme Court of the State of California

In Bank

GARCIA ET AL.
v.
SWOAP, AS DIRECTOR, ETC.

Respondent's petition for hearing DENIED.

[Clerk's Stamped Certification]

SUPREME COURT
FILED FEB. 3, 1977
C. E. BISHEL, Clerk

TO.....
Acting Chief Justice

Appendix D

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
SOCIAL AND REHABILITATION SERVICE
Washington, D.C. 20201

Dec. 12, 1974

David B. Swoap
Director
State Department of Benefit Payments
744 'P' Street
Sacramento, California 95814

Attention: James Moose
Deputy Director, Legal Affairs

Dear Mr. Swoap:

This is in response to your departments request that we review your State's method for computing AFDC budgets and provide the Departments views regarding the legality of such procedures. Enclosed is a copy of an opinion from the office of General Counsel, HEW, setting forth the Department's views. We fully endorse this method of accounting for recipient income and consider it a proper and efficient method of administration.

Yours very truly,

JAMES S. DWIGHT, JR.

Enclosure

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

OFFICE OF THE GENERAL COUNSEL
Human Resources Division

DATE: December 10, 1974

To: Donald M. Thayer
Director, Office of Policy Control, SRS

From: Robert P. Jaye
Deputy Assistant General Counsel

Subject: Legality of Prior Month Budgeting

Prior month budgeting is a procedure used for computing the amount of an AFDC grant on the basis of income actually available in the month prior to the computation month, which is itself one month before the payment month. For example, a computation would be made in December of a recipient's January grant. The computation would be based upon the actual income received by the recipient during November. You have first asked whether this method of "prior month budgeting" is permited by our available income regulations appearing at 45 CFR section 233.20(a)(3)(ii)(c). Second, you have stated that, for purposes of prior month budgeting, an erroneous overpayment of a welfare grant may be treated as income in a manner identical to all other inflows during the month[1] (with the sole exception of the exact amount of the welfare payment to which the recipient is actually entitled).

1. Except for those inflows which are treated as resources pursuant to the State plan.

We have concluded that neither of these practices violates our regulations.

With respect to the first issue, this Office issued an opinion on June 3, 1973, specifically approving prior month budgeting. That opinion stated, in pertinent part, as follows:

> A literal reading of the language in 45 CFR section 233.20(a)(3)(ii)(c) would mean that unless the individual has his total income in hand when the assistance check is issued (or maybe even received), that income may not be deducted in determining the amount of his grant. This would mean that the only time income could be counted would be when it was received at the same time the assistance check was issued (or received). Otherwise the agency would be counting income that the individual spent (or at least begun to spend) and that was no longer available to him. This ridiculous result was clearly not intended by the regulation.
>
> On the contrary, the regulation was intended to preclude the consideration of income that was, in fact, never available to the individual, or that had not been available to him for a substantial period of time. But when a person has, for example, regular earnings, the fact that he spends part of his paycheck before the assistance check arrives does not mean that the entire amount of the paycheck is not to be deducted in determining the amount of the assistance grant.
>
> In fact, States have been permitted considerable administrative latitude in determining the period for which income is reflected in the assistance grant, with the result that income is not always (indeed, is not usually) deducted from the assistance check for the month the income is received and available to the individual. Instead, many States find it administratively simpler and more accurate to deduct the income received in one month from the assistance check for the next month or even for the month after that. This is permitted under Federal policy as a reasonable method of administration, as long as it is applied uniformly and consistently, and it presents no conflict with our interpretation of the regulation on available income.

With respect to your second question, the regulations do not preclude treatment of any check received from the welfare agency in excess of the amount to which the recipient was entitled, as income. This is subject to the *caveat* that, unless the recovery of that overpayment is permitted by our recoupment regulations appearing at 45 CFR section 233.20(a)(12)(i), the State agency could (in the example given at the beginning of this memorandum) treat as currently available income for purposes of a December computation of a January welfare check, only overpayments received by the recipient during the month of November.

If the overpayment does not come to the agency's attention until January (or thereafter) the overpayment cannot be considered as a currently available income or resource, unless the money is, in fact, still currently available during the budget month.[2] Nevertheless, an excess payment by the welfare agency in November may be treated as income for purposes of a December computation in States that utilize prior month budgeting.

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2. Of course, recoupment under the circumstances delineated in our cited recoupment regulation would be permitted at a later date.

Prepared by RJaye:nmo, x50540
12/10/74

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IN THE SUPREME COURT OF THE

UNITED STATES

12

October Term, 1977

NO. 76-1523

DAVID B. SWOAP, Director of the State Department of Benefit Payments, Petitioner,

vs.

MARGUARITA GARCIA and PALMIDA CASTANON, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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SUBJECT INDEX

	Page
BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.	1
OPINION BELOW	1
STATEMENT OF THE CASE.	2
REASONS FOR DENYING THE PETITION	4
A. THERE ARE INDEPENDENT AND ADEQUATE STATE GROUNDS FOR THE JUDGMENT	4
1. CALIFORNIA'S OVERPAYMENT STATUTE, WELFARE AND INSTITUTIONS CODE SECTION 11004, PROVIDED AN INDEPENDENT AND ADEQUATE STATE GROUND	5
2. THE CALIFORNIA PAYMENT STATUTE PROVIDED AN INDEPENDENT AND ADEQUATE STATE GROUND.	9
B. THE RULE THAT A STATE MAY CONSIDER ONLY INCOME AND RESOURCES ACTUALLY AVAILABLE IS NOT A NOVEL ONE	11
CONCLUSION	14

TABLE OF AUTHORITIES CITED

Cases-California	Pages
Garcia v. Swoap, 63 Cal. App. 3d 903, 134 Cal. Rptr. 137 (1976).	1,2,4,8,9
Oliva v. Swoap, 59 Cal. App. 3d 130, 130 Cal. Rptr. 411 (1976)	5,8
Webb v. Swoap, 40 Cal. App. 3d 191, 114 Cal. Rptr. 897 (1974)	5
Cases-Federal	
Adams v. Russell, 229 U.S. 353 (1913).	10
Carleson v. Remillard, 406 U.S. 598 (1972) . . .	11
Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965)	5,8
De Laussure v. Gaillard, 127 U.S. 216 (1888)	10
Dixon V. Duffy, 344 U.S. 143 (1952).	6
Fox Film Corp v. Muller, 296 U.S. 207 (1935)	4
Gilliard v. Craig, 409 U.S. 807 (1972)	11
Hagans v. Lavine, 409 U.S. 528(1974).	12,13
Herb v. Pitcairn, 324 U.S. 117 (1945).	4,10,11
Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965).	10
Johnson v. Risk, 137 U.S. 300 (1890)	10
King v. Smith, 392 U.S. 309 (1968)	5,11,13
Klinger v. Missouri, 13 Wall. 257 (1872)	10
Lewis v. Martin, 397 U.S. 552 (1970)	11
Lynch v. New York, 293 U.S. 52 (1934).	10
Minnesota v. National Tea Co., 309 U.S. 551 (1940)	4
NWRO v. Mathews, 533 F. 2d 637 (D.C. Cir. 1976)	9,12
NWRO v. Weinberger, 377 F. Supp. 861 (D.C.D.C. 1974)	12

	Pages
Parker v. North Carolina, 397 U.S. 790 (1970)	4
Philbrook v. Glodgett, 421 U.S. 707 (1975)	11
Shea v. Vialpando, 416 U.S. 251 (1974)	11,12
Townsend v. Swank, 404 U.S. 282 (1971)	11,12
Van Lare v. Hurley, 421 U.S. 338 (1975)	11
Wood Mowing Machine Co. v. Skinner, 139 U.S. 293 (1891)	10
Statutes-California	
Welfare and Institutions Code Section 11004	4,5,8
Welfare and Institutions Code Section 11004(e)	6,7,8,11
Welfare and Institutions Code Section 11450	4,7
Welfare and Institutions Code Section 11450(a)	9,11
Welfare and Institutions Code Section 11452	7
Welfare and Institutions Code Section 11456	3
Labor Code Section 204	3
Statutes-Federal	
United States Code, Title 42, Sec. 600 et seq.	2
United States Code, Title 42, Sec. 602(a)(7)	9,11,12
Regulations-California	
Eligibility and Assistance Standards Manual Section 42-303	7
Eligibility and Assistance Standards Manual Section 44-212.2	7
Eligibility and Assistance Standards Manual Section 44-315.411	7
Eligibility and Assistance Standards Manual Section 44-315.6	2
Regulations-Federal	
45 Code of Federal Regulations, Sec. 233.20 (a)(3)(ii)	9
45 Code of Federal Regulations, Sec. 233.20 (a)(3)(ii)(C)	11
45 Code of Federal Regulations, Sec. 233.20 (a)(3)(ii)(D)	4
45 Code of Federal Regulations, Sec. 233.20 (a)(12)(i)(A)	5
45 Code of Federal Regulations, Sec. 233.20 (a)(12)(i)(A)(1)	6
45 Code of Federal Regulations, Sec. 233.20 (a)(12)(i)(A)(2)	6
45 Code of Federal Regulations, Sec. 233.20 (a)(12)(i)(C)(4)(f)	5,6,7

	Page
Miscellaneous	
Handbook of Public Assistance Administration Section 3131(5)(1940) (Department of Health, Education and Welfare)	11
Index To Appendices	
Appendix A. Letter from David Hurwitz, Department of Health, Education and Welfare (3-16-77)	

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 76-1523

DAVID B. SWOAP, Director of the State Department of Benefit Payments, Petitioner,

vs.

MARGUARITA GARCIA and PALMIDA CASTANON, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

This Brief in Opposition to the Petition for a Writ of Certiorari to the Supreme Court of the State of California is filed on behalf of Marguarita Garcia, Palmida Castanon and the class they represent.

OPINION BELOW

The opinion of the Court of Appeal is reported at 63 Cal. App. 3d 903, 134 Cal. Rptr. 137 (1976).

STATEMENT OF THE CASE

Respondents Garcia and Castanon filed suit in the Los Angeles County Superior Court seeking declaratory relief and to enjoin Petitioners' use of the Prior Month Budgeting system (PMB)[1/] to compute the amount of the grant for Aid to Families with Dependent Children (AFDC)[2/]. The PMB system operates by calculating the AFDC grant on the basis of net nonexempt income received two months prior to actual payment[3/].

To illustrate, Mrs. Garcia was receiving AFDC in the amount of $355 per month. This was the sole income for Mrs. Garcia and her four children until June 1974 when her husband began to give her $200 per month in child support. She promptly reported the payments to her caseworker and spent the money on past due bills. In August, her monthly AFDC grant was reduced to $155 to reflect the $200 child support payment made in June. However, her husband had ceased child support payments after his July payment. Thus, Mrs. Garcia's sole income for herself and four children in June and July was $155 from reduced AFDC grants.

Mrs. Castanon was receiving $336 in AFDC in July, 1974 because her husband was unemployed except for sporadic work which in July amounted to about $250 in nonexempt income. This income was promptly reported. Mr. Castanon used the $250 for his father's funeral and personal needs. In August he left the family and did not return. In September, Mrs. Castanon and her child received an AFDC grant of $86 as their sole income.

Prior to PMB the concurrent method of budgeting was

1/ Eligibility and Assistance Standards (EAS) Manual Section 44-315.6.

2/ 42 U.S.C. section 600 et seq.

3/ Garcia v. Swoap, 63 Cal. App. 3d 903, 906, 134 Cal. Rptr. 137, 139 (1976).

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used in which the grant was calculated on the basis of an estimate of nonexempt income from the month immediately preceding the payment. Corrections for fluctuating income were made on the second payment in the month to the extent possible[4/]. To the extent it was not possible to correct for fluctuations in the same month, an overpayment or underpayment was assessed.

To illustrate, assume the concurrent system had been used to compute Respondents' grants. When Mrs. Garcia received her support payment in June she promptly reported it to her caseworker. It was too late to reflect the payment in the second July payment; therefore, Mrs. Garcia would have received a grant of $355 and a $200 overpayment would have been assessed. The August grant would then be estimated on the basis of July and Mrs. Garcia would have received a grant of $155 and $200 in support for a total of $355. In August, when her support payment was not made, her second payment would be increased to assure her a grant of $355[5/].

In the same manner, to the maximum extent possible, Mr. Castanon's earnings in July would have been adjusted in the second July payment. If that was not possible, an overpayment or underpayment would be assessed. When Mr. Castanon left the home in August, an underpayment would be assessed and Mrs. Castanon would have received an immediate check in August[6/]. PMB was

4/ California law requires grants be paid on the 1st and 15th of each month. See: Welfare and Institutions Code Section 11456; Labor Code Section 204. All future references to California statutes are to Welfare and Institutions Code.

5/ If the caseworker had waited until the end of the month to be sure Mrs. Garcia did not receive the support payments, an underpayment of $200 would have been assessed in September.

6/ Had Mr. Castanon left earlier in the month, the second payment would have been raised to insure Mrs. Castanon and her child the full dollar amount to which she was entitled.

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specifically implemented to avoid these overpayment and underpayment situations as Petitioner admits[7/].

Respondents contended in the court of appeal that PMB violated both state and federal law. Specifically, they contended that the system was contrary to Welfare and Institutions Code Section 11450 and Welfare and Institutions Code Section 11004 and 45 C.F.R. §233.20(a)(3)(ii)(D)[8/].

The California Court of Appeal, Second District, reversed. The California Supreme Court denied a hearing in the case, and Petitioner then filed his Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE PETITION

There are independent and adequate state grounds on which the judgment rests, and the decision does not present a substantial federal question not previously determined by the Court.

A. THERE ARE INDEPENDENT AND ADEQUATE STATE GROUNDS FOR THE JUDGMENT

It is well established that this Court will not review a judgment of a state court if that judgment rests on independent and adequate state grounds[9/]. This rule has been interpreted as "...not a mere technical rule nor a rule of... [the Court's] convenience."[10/] "It is found in the partition of power between state and federal judicial systems and in the limitations of ...[this court's] jurisdiction.[11/] The California Court of

7/ See: Petition for Writ of Certiorari, p. 5-6.

8/ Garcia v. Swoap, supra, 63 Cal. App. 3d at 908, 134 Cal. Rptr. at 140.

9/ Fox Film Corp v. Muller, 296 U.S. 207 (1935); Minnesota v. National Tea Co., 309 U.S. 551 (1940); Parker v. North Carolina, 397 U.S. 790 (1970).

10/ Minnesota v. National Tea Co., supra, at 557.

11/ Herb. v. Pitcairn, 324 U.S. 117, 125 (1945)

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Appeal held that the PMB system violated both state and federal law. Where both state and federal grounds were urged in the state court, it must appeal on the record, that any federal ground presented to the state court was the sole basis for the decision or that federal law compelled the decision, and it is incumbent upon Petitioner to establish the jurisdiction of the Court.[12/]

1. CALIFORNIA'S OVERPAYMENT STATUTE, WELFARE AND INSTITUTIONS CODE SECTION 11004, PROVIDED AN INDEPENDENT AND ADEQUATE STATE GROUND.

States which choose to become part of the AFDC program and use matching federal funds must conform to the requirements of the Social Security Act and the federal regulations promulgated by HEW. The states can adopt plans which are more liberal than the federal scheme but they may not be more restrictive.[13/] To the extent that a state does adopt more liberal standards, it becomes a matter of state, not federal, law.

The requirement that states recoup overpayments is not mandatory under federal law.[14/] When California elected to collect overpayments, federal regulations provided for certain safeguards for recipients.[15/] If California's overpayment collection statutes do not allow as great a reduction of grants as federal regulations do, then California's overpayment scheme is solely a matter of state law. If Petitioner's regulations violate that scheme,

12/ Department of Mental Hygiene of California v. Kirchner, 380 U.S. 194 (1965).
13/ King v. Smith, 392 U.S. 309 (1968), and see note 39.
14/ 45 C.F.R. §233.20(a)(12)(i)(A) provides that states may recoup overpayments. See also: Webb v. Swoap, 40 Cal. App. 3d 191, 114 Cal. Rptr. 897, (1974); Oliva v. Swoap, 59 Cal. App. 3d 130, 130 Cal. Rptr. 411 (1976)
15/ 45 C.F.R. §233.20(a)(12)(i)(C)(4)(f).

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the violation of state law provides an independent and adequate state ground, as this Court does not sit to determine matters of state law.[16/]

The California scheme of overpayment recoupment is substantially different from the federally required safeguards. Under federal regulations a state can only recoup overpayments if income and resources are currently available in the amount of the reduction.[17/] However, if a willful withholding of information by a recipient occurs, the state may reduce the overpayment irrespective of current income and resources,[18/] but the reduction can not, on a case-by-case determination, cause undue hardship.[19/]

Under the California scheme, the Petitioner can reduce the grant only to the extent current income and resources are available. But even if information is withheld willfully, Petitioner can reduce the grant only to the extent that there are resources and income available to meet the current needs of the child.[20/] The

16/ Dixon v. Duffy, 344 U.S. 143 (1952)
17/ 45 C.F.R. §233.20(a)(12)(i)(A)(1)
18/ 45 C.F.R. §233.20(a)(12)(i)(A)(2)
19/ 45 C.F.R. §233.20(a)(12)(i)(C)(4)(f)
20/ Section 11004(e) provides:
"(e) Current grants may be reduced because of prior overpayments only if the recipient has income or resources available in the amount by which the county proposes to reduce payment except; that where there is evidence which clearly establishes that a recipient willfully withheld information about his income or resources, such income or resources may be considered in the determination of need to reduce the amount of the grant in current or future periods. Prior to effecting any reduction of current grants to recover prior overpayments, the recipient shall be advised of the proposed reduction and of his entitlement to a hearing on the propriety of the reduction. In no event shall the grant to a needy child be reduced unless the parents or other responsible persons have sufficient available resources or income to meet the current needs of the needy child according to the department standard during the period of reduction."

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current needs of the children are called the Basic Standard of Adequate Care (BSAC) and are set forth in the statute subject to cost of living revision by Petitioner.[21] The BSAC is a larger amount than the Maximum Aid Payment (MAP) which is the amount of the grant payment.[22] Therefore, the amount of any reduction in the grant level (MAP) as required by federal regulation is necessarily less than the "current needs of the child." (BSAC).

Under section 11004(e), when no other income or resource is currently available, the maximum overpayment collectable from Respondent, even if she had willfully withheld information, would be $10 per month; the difference between the BSAC for her children, $389, and the MAP for her family, $399.

Had Respondent Castanon willfully failed to report her husband's income, the maximum collectable from her in the absence of other currently available income or resources would have been $82 per month; $237, her family's MAP, less $155, her child's BSAC.[23] Under federal law the state could reduce the grant payment regardless of available income or resources if the reduction did not cause "undue hardship."[24]

Respondents' grants were reduced below the level of the current needs of their children (BSAC) by PMB, even though they had no currently available income or resources to meet those needs, and in spite of the fact that they did not willfully withhold information. This being so, the Court of Appeals held:

21/ Section 11452; EAS Manual §§42-303; 44-212.2. The BSAC for Mrs. Garcia and her children at the time of appeal was $449.
22/ Section 11450; EAS Manual §44-315.411. The MAP for Mrs. Garcia and her children at the time of the appeal was $399.
23/ These examples are based on MAP and BSAC at the time of appeal.
24/ 45 C.F.R. 233.20(a)(12)(i)(C)(4)(f)

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"In this respect, PMB also avoids the specific recoupment limitations set forth in Welfare and Institutions Code section 11004,....Subdivision (e) of section 11004 is clearly worded to protect the children in these situations....However, as PMB is presently applied, a prior 'overpayment' occurs under these recoupment provisions when income is received in a particular month but is not reflected in the assistance grant for that month. (See Oliva v. Swoap, 59 Cal. App. 3d 130, 137, 130 Cal. Rptr. 411.) In the guise of 'retrospectively applied assistance payments,' PMB provides for the same sort of correction for 'overpayment' in instances of sporadic family income, but without the concomitant protective feature which assures that the child's current needs will not go wanting."[25]

This is exactly the situation where an independent and adequate state ground was meant to preclude review. As stated in Department of Mental Hygiene of California v. Kirchner:[26]

"This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily pre-

25/ Garcia v. Swoap, supra, 63 Cal. App. 3d at 911-912, 134 Cal. Rptr. at 142.
26/ 380 U.S. 194, 197 (1964)

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sented, and the party seeking review here must show that we have jurisdiction of the case. Were we to assume that the federal question was the basis for the decision below, it is clear that the California Supreme Court, either on remand or in another case presenting the same issues, could inform us that its opinion was in fact based, at least in part, on the California [law], thus leaving the result untouched by whatever conclusions this Court might have reached on the merits of the federal question."[27/] (notes omitted)

2. THE CALIFORNIA PAYMENT STATUTE PROVIDED AN INDEPENDENT AND ADEQUATE STATE GROUND

The California statute provides for "...each needy family...[to] be paid...an amount of aid each month which when added to his income...is equal to the sums...[provided by the statute].[28/] The sum referred to is the amount of the grant payment plus net nonexempt income. Clearly, this phrase can be interpreted to preclude PMB regardless of the federal law on the subject.[29/]

The California Court of Appeal did not specifically rely on the state statute. However, the point was briefed and argued before the court.[30/] State courts do not sharply separate an

27/ Id.
28/ Section 11450(a).
29/ See: 42 U.S.C. 602(a)(7); 45 C.F.R. 233.20(a)(3)(ii); NWRO v. Mathews, 533 F. 2d 637 (D.C. Cir. 1976), and Respondents' Brief in Opposition to Petition for Writ of Certiorari, infra.
30/ Garcia v. Swoap, supra, 63 Cal. App. 3d at 908, 134 Cal. Rptr. at 140.

adjudication of both state and federal questions when reaching a judgment in a case.[31/] Nonetheless, this Court has, in the past, declined to take such cases.[32/] It is Respondents' contention that the state and federal grounds are "...not so interwoven that [the Court is] unable to conclude that the judgment rests upon an independent interpretation of state law."[33/]

Even if the Court concludes that there are reasonable grounds to believe that the judgment may rest solely on the federal question, there is authority to deny a review:

> "But what to do with cases in which the record is ambiguous but presents reasonable grounds to believe that the judgment may rest on decision of a federal question has long vexed the Court. In many cases the answer has been a strict adherence to the rule that it must affirmatively appear that the federal question was decided and that its decision was essential to disposition of the case; and that where it is not clear whether the judgment rests on a federal ground or an adequate state one, this Court will not review. (Citations omitted)
>
> "In other cases where justice seemed to require it, for example because of

31/ See e.g.: Herb v. Pitcairn, 324 U.S. 117 (1945).
32/ Klinger v. Missouri, 13 Wall. 257 (1872); De Saussure v. Gaillard, 127 U.S. 216 (1888); Johnson v. Risk, 137 U.S. 300 (1890); Wood Mowing Machine Co. v. Skinner, 139 U.S. 293 (1891); Adams v. Russell, 229 U.S. 353 (1913); Lynch v. New York, 293 U.S. 52 (1934).
33/ Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 492 (1965).

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> supervening events, the Court has said that to set aside the judgment and remand the case to the state court for further consideration is not to review, in any proper sense of the term, the decision of the state court."[34]

In view of the wording of Section 11450(a) and Section 11004(e), justice does not require this Court to set aside the judgment and remand the case. The references to state statutes as argued above are sufficient to justify the denial of the Writ.

B. THE RULE THAT A STATE MAY CONSIDER ONLY INCOME AND RESOURCES ACTUALLY AVAILABLE IS NOT A NOVEL ONE.

The federal question presented concurrently to the state court is founded in the federal mandate that the states "shall, in determining need,...take into consideration any other income and resources" of recipients.[35] This mandates that only actual income currently available be considered.[36] The policy is long-standing,[37] during which time numerous amendments of Title IV of the Social Security Act have taken place. This Court has held that the policy clearly comports with the Act[38] and has struck down numerous state statutes or regulations violating the "actually and currently available standard" as violative of The Supremacy Clause of the United States Constitution.[39] Since the currently

34/ Herb v. Pitcairn, supra, 324 U.S. at 126.
35/ 42 U.S.C. 602(a)(7)
36/ 45 C.F.R. 233.20(a)(3)(ii)(C).
37/ The policy originated in HEW's Handbook of Public Assistance Administration §3131(5) (1940).
38/ King v. Smith, supra.
39/ Lewis v. Martin, 397 U.S. 552 (1970); Townsend v. Swank, 404 U.S. 282 (1971); Carleson v. Remillard, 406 U.S. 598 (1972); Gilliard v. Craig, 409 U.S. 807 (1972); Shea v. Vialpando, 416 U.S. 251 (1974); Van Lare v. Hurley, 421 U.S. 338 (1975); Philbrook v. Glodgett, 421 U.S. 707 (1975).

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available standard rests upon 42 U.S.C. 602(a)(7), overpayment regulations must also consider currently available income, at least where no withholding of information by the recipient occurred.[40] Therefore, the court below correctly followed a long line of federal decisions.

Petitioner alleges a low-level official of the Department of Health, Education and Welfare (HEW) had at one time approved his PMB scheme and argues that by holding his scheme invalid, an important function of HEW has been abrogated. This argument overlooks the fact that under our system of government, the final interpretation of the Constitution and statutes of the United States is with the judicial branch, not the executive. While the agency's interpretation may be entitled to great weight, the opinion of a low-level official is not. Even had HEW issued an opinion, the principal:

> "...applies only where the relevant statutory language is unclear or susceptible of differing interpretations. [citations omitted] In view of the literal requirements of §402(a)(7) [42 U.S.C. 602(a)(7)] which accord with the federal policy underlying its enactment, [the Court] need not look to agency practice...."[41]

Additionally HEW has not been totally consistent in applying federal standards itself. Cf: Shea v. Vialpando,[42] Hagans v. Lavine,[43] Letter from David Hurwitz dated March 16, 1977. Appendix A. HEW has on two occasions proposed federal PMB regulations and

40/ NWRO v. Mathews, supra; NWRO v. Weinberger, 377 F. Supp. 861 (D.C. D.C. 1974).
41/ Shea v. Vialpando, supra, 416 U.S. at 262, n. 11; See also Townsend v. Swank, supra, 404 U.S. at 286, n. 3.
42/ 416 U.S. 251 (1974)
43/ 415 U.S. 528, 533 n. 4 (1974).

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on both occasions the agency chose to withdraw its proposed regulations.

Petitioner further argues that allowing state courts to interpret federal statutes and the Constitution and invalidate Petitioner's or HEW's efforts at welfare reform, will somehow undermine the relation between the federal government and the states. This ignores the fact that state courts as well as federal ones are charged with enforcing the United States Constitution[44/] and are bound by it to strike down state regulations which are inconsistent with federal law.[45/] Petitioner's concern with welfare reform is commendable, but he must recognize that his ability to carry out change must be a limited one within the framework set out by the state legislature or Congress. Sweeping changes such as the one contemplated here are best left to legislatures which are directly responsible to the electorate. Petitioner has offered no reason why the question presented here in any way differs from King v. Smith and its progeny. Therefore, there is no novel question presented, and this Court should deny the Petition for Writ of Certiorari.

44/ See: Mr. Justice Rehnquist's dissent in Hagans v. Lavine, supra, 415 U.S. at 553.

45/ See note 34 supra.

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CONCLUSION

For the foregoing reasons, a Writ of Certiorari to the California Supreme Court should be denied.

DATED: September 8, 1977 Respectfully submitted,

Western Center on Law and Poverty, Inc.
Philip L. Goar
Dorothy T. Lang
Legal Aid Foundation of Long Beach
Warren D. Weinstein
Marsha L. Jones

Philip L. Goar

Warren D. Weinstein
Attorneys for Respondents

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

MAR 16 1977

Mr. Kevin M. Aslanian
President
Welfare Recipients League, Inc.
1505 East Santa Clara Street
San Jose, California 95116

Dear Mr. Aslanian:

Secretary Califano has asked me to thank you for your letter of February 22 concerning administration of the Aid to Families with Dependent Children (AFDC) program in California.

We are aware of the recent difficulties which have arisen in the California welfare program regarding the conformity of California welfare plans with certain provisions of Federal law. Procedures have been instituted for correction of State plan provisions to comply with Federal law and regulations, and the California Appellate Court decision in Garcia v. Swoap (1976),63.C.A. 3d 903.

We are taking the liberty of forwarding your letter to Mr. Charles W. Goady, Regional Commissioner in the Department's San Francisco Regional Office at 50 Fulton Street, Federal Office Building, San Francisco, California 94102, with the request that he advise you on the current status of this issue.

We appreciate your bringing this matter to our attention.

Sincerely,

David S. Hurwitz

David S. Hurwitz
Acting Commissioner
Assistance Payments Administration

cc: Regional Commissioner, Region IX

Appendix A

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid, I am over the age of eighteen years and not a party to the within action; my business address is: 3535 West Sixth Street, Los Angeles, California 90020. On September 8, 1977 I served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND AFFIDAVITS IN SUPPORT THEREOF; BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA on Petitioners in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

EVELLE J. YOUNGER, Attorney General of
the State of California
N. EUGENE HILL, Assistant Attorney General
EDMUND E. WHITE, Deputy Attorney General
JEROLD A. PROD, Deputy Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 8, 1977, at Los Angeles, California.

Carla Francine Testi

CARLA FRANCINE TESTI

Supreme Court, U. S.
FILED
MAY 5 1978
MICHAEL RODAK, JR., CLERK

No. 76-1523

In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID B. SWOAP, Director of the State Department of Benefit Payments, PETITIONER

v.

MARGUARITA GARCIA and PALMIDA CASTANON

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND DISTRICT, OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,

PETER BUSCEMI,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statement	2
Discussion	8
Conclusion	25

CITATIONS

Cases:

Bowles v. *Seminole Rock Co.*, 325 U.S. 410	8
California v. *Krivda*, 409 U.S. 33	12
Cooper v. *Laupheimer*, 316 F. Supp. 264	19, 20, 22
Department of Mental Hygiene v. *Kirchner*, 380 U.S. 194	12
Ehlert v. *United States*, 402 U.S. 99	8
Hagans v. *Berger*, 536 F. 2d 525	19, 20
Hagans v. *Wyman*, 399 F. Supp. 421	19
King v. *Smith*, 392 U.S. 309	3, 18, 19
Lewis v. *Martin*, 397 U.S. 552	18, 19
Minnesota v. *National Tea Co.* 309 U.S. 551	12
National Welfare Rights Organization v. *Weinberger*, 377 F. Supp. 861	19, 20, 21, 22
Northern Indiana Public Service Co. v. *Walton League*, 423 U.S. 12	8
Paschall v. *Christie-Stewart, Inc.*, 414 U.S. 100	12

Cases—Continued

	Page
Philadelphia Newspapers, Inc. v. *Jerome*, No. 77-308, decided January 9, 1978	12
Van Lare v. *Hurley*, 421 U.S. 338	18, 19

Statutes and regulations:

Food Stamp Act of 1977, Section 5(f), Pub. L. 95-113, 91 Stat. 963 (to be codified at 7 U.S.C. 2014(f))	14
Social Security Act of 1935, Title IV, 49 Stat. 627, as amended, 42 U.S.C. (and Supp. V) 601 *et seq.*	2
Section 401, 42 U.S.C. 601	2
Section 402(a), 42 U.S.C. (Supp. V) 602(a)	3
Section 406(a)(1), 42 U.S.C. 606(a)(1)	2, 18
Title XVI, as added, 86 Stat. 1465, and amended, 42 U.S.C. (Supp. V) 1381 *et seq.*	12
Section 1602(c)(1), 42 U.S.C. (Supp. V) 1382(c)(1)	12
Cal. Welfare and Inst. Code (West 1972):	
§ 11004	7, 10
§ 11004(e)	10, 11
§ 11450	10
45 C.F.R. 205.40(a)(2)	13
45 C.F.R. 205.40(b)(2)	13
45 C.F.R. 233.20(a)(1)(i)(A)(1)	11, 21
45 C.F.R. 233.20(a)(3)(ii)(D)	7, 8, 11, 13
45 C.F.R. 233.20(a)(12)(i)	7, 8

Miscellaneous:

	Page
California Eligibility and Assistance Standards Manual:	
§ 44-315.6	3
§ 44-315.8	4, 23
§ 44-315.822	23
Congressional Research Service, United States Library of Congress, *Administration of the AFDC Program—A Report of the House Committee on Government Operations* (1977)	*passim*
40 Fed. Reg. 36141	9
S. Rep. No. 628, 74th Cong., 1st Sess. (1935)	3

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1523

DAVID B. SWOAP, Director of the State Department of Benefit Payments, PETITIONER

v.

MARGUARITA GARCIA and PALMIDA CASTANON

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND DISTRICT, OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of October 3, 1977.

OPINION BELOW

The opinion of the court of appeal (Pet. App. 1-16) is reported at 63 Cal. App. 3d 903, 134 Cal. Rptr. 137. The superior court did not write an opinion.

JURISDICTION

The judgment of the court of appeal was entered on November 17, 1976. A petition for rehearing was denied on December 15, 1976 (Pet. App. 17). On February 3, 1977, the Supreme Court of California denied a petition for hearing (Pet. App. 18). The petition for a writ of certiorari was filed on May 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether a state may compute benefits under the Aid to Families with Dependent Children program by reference to the nonwelfare income a family actually receives during a month before the benefits are paid.

STATEMENT

1. The Aid to Families with Dependent Children ("AFDC") program, established by the Social Security Act of 1935, 49 Stat. 627, as amended, 42 U.S.C. (and Supp. V) 601 *et seq.*, is designed to "help maintain and strengthen family life" by providing aid to needy children who are living with parents or relatives and who have "been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent * * *." Sections 401 and 406(a)(1), 42 U.S.C. 601 and 606(a)(1). The program is financed by matching federal and state funds and is administered by the states. Participation in the program is optional,[1] and Congress has left considerable administrative latitude to participating states. See *King* v. *Smith*, 392 U.S. 309, 316-319; S. Rep. No. 628, 74th Cong., 1st Sess. 4, 19 (1935). States wishing to participate must submit benefit plans for the approval of the Secretary of Health, Education, and Welfare ("HEW"), and the Secretary must approve the plans if they comply with the requirements of Section 402(a) of the Act, 42 U.S.C. (Supp. V) 602(a).

California uses a "prior month budgeting" (PMB) system to compute AFDC monthly grants. See California Eligibility and Assistance Standards Manual ("EASM") § 44-315.6 (Pet. 3). This means that the amount of AFDC benefits received in any given month depends directly on the recipient's income in a previous month. California determines AFDC grants for the first and second calendar months of eligibility on the basis of known or estimated income in those two months. Thereafter, the state computes AFDC payments according to the PMB method. Before the 10th of each month, each AFDC family must submit a report indicating the source and amount of the family's nonwelfare income for the previous month. On the basis of this information, California calculates the amount of the family's AFDC benefits for the following month. Thus, non-

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[1] All 50 states and the District of Columbia now are participating in the AFDC program. See Congressional Research Service, United States Library of Congress, *Administration of the AFDC Program—A Report to the House Committee on Government Operations* (1977).

welfare income received in April is reported in May and determines the AFDC payment for June. In this example, April is the "budget" month, May the "reporting" month, and June the "payment" month.

The amount of nonwelfare income in the payment month may differ from that in the budget month. Changes in nonwelfare income will not affect AFDC payments until two months after the changes occur. AFDC grants in the two months immediately following a decrease in nonwelfare income therefore may be inadequate to fulfill recipients' needs. California has provided for supplemental payments when "unusual and unforseen substantial changes in a recipient's income" make such payments "necessary to protect the welfare of the child(ren)." EASM § 44-315.8.[2]

2. Respondents are California AFDC recipients. In the summer of 1974 respondent Garcia was the mother of four children. From 1970 through May 1974 the AFDC program was the sole source of support for her and her family. By the latter date

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[2] Supplemental payments in any month are limited so that the total AFDC grant, together with available nonwelfare income, does not exceed the maximum aid allowable in the absence of nonwelfare income.

In addition, the currently effective California regulation imposes a ceiling on the total amount of supplemental payments an AFDC family may receive. When supplemental payments are made in more than one month, the total amount of such payments may not exceed the recipient's total nonwelfare income during the first two months for which AFDC benefits were provided. A proposed revision of California's regulation would eliminate this restriction on the total amount of supplemental payments to one AFDC family. See pages 22-25, *infra*.

she was receiving monthly benefits of $355. In June 1974 and in July 1974, she received child support payments of $200 from her ex-husband. She reported this income to her county caseworker, and her AFDC benefits for August and September 1974 were reduced to $155 per month. Mrs. Garcia received no child support from her ex-husband in August and September 1974. See Pet. App. 5.

In mid-1974 Mrs. Castanon had one child and was receiving $336 each month in AFDC benefits. Her unemployed husband found work in July 1974 and earned $250 in nonexempt income. Mrs. Castanon reported this income to her caseworker, and her AFDC payment for September 1974 was reduced to $86. Mr. Castanon left his family in August 1974 and did not return. He provided no funds for his family in September 1974. See Pet. App. 5-6. The record does not indicate that either Mrs. Garcia or Mrs. Castanon sought supplemental payments for the months in which their AFDC benefits were reduced.

On September 16, 1974, respondents filed this suit in Los Angeles County Superior Court, on behalf of themselves and a class consisting of all other California AFDC recipients. Respondents contended that the PMB system violated both HEW regulations and state law and was incompatible with the purpose of the AFDC program, *i.e.*, providing for the current needs of dependent children. They sought declaratory and injunctive relief against California's continued use of the PMB method in computing AFDC benefits.

While respondents' action was pending in superior court, California officials submitted to the Secretary a written inquiry concerning PMB's status under applicable federal regulations. On December 12, 1974, the Secretary's delegate replied that he "fully endorse[d] this method of accounting for recipient income and consider[ed] it a proper and efficient method of administration" (Pet. App. 19). He attached to his reply an opinion issued by the office of HEW's General Counsel. The opinion reported that (Pet. App. 21):

> * * * States have been permitted considerable administrative latitude in determining the period for which income is reflected in the assistance grant, with the result that income is not always (indeed, is not usually) deducted from the assistance check for the month the income is received and available to the individual. Instead, many States find it administratively simpler and more accurate to deduct the income received in one month from the assistance check for the next month or even for the month after that. This is permitted under Federal policy as a reasonable method of administration, as long as it is applied uniformly and consistently, and it presents no conflict with our interpretation of the regulation on available income.

Petitioner informed the superior court of the Secretary's approval of the PMB system and, on March 28, 1975, the court denied respondents' request for a preliminary injunction and entered summary judgment for petitioner.

The court of appeal reversed (Pet. App. 1-16) and held the PMB approach invalid. The court ruled that PMB violates the federal regulation requiring state AFDC plans to determine need and amounts of assistance payments by considering "net income available for current use and currently available resources * * *." See 45 C.F.R. 233.20(a)(3)(ii)(D). By computing AFDC benefits on the basis of income received in an earlier month, the court decided, California disregarded the federal command to consider "income available for current use." In the court's view, when an AFDC grant is reduced because of income received in the budget month but not in the payment month, PMB operates "as a streamlined form of recoupment" of earlier AFDC overpayments (Pet. App. 11). Seen in this light, the court concluded, PMB violates federal recoupment regulations, 45 C.F.R. 233.20(a)(12)(i), and the specific recoupment limitations contained in Cal. Welfare and Inst. Code § 11004 (West 1972). These provisions, according to the court, "proscribe the reduction of a subsequent assistance payment in the amount of a prior overpayment unless the recipient has sufficient income or resources available to meet the current needs of the needy child" (Pet. App. 11).

The court of appeal denied a petition for rehearing (Pet. App. 17), and petitioners sought review in the Supreme Court of California. That court denied the petition for hearing (Pet. App. 18).

DISCUSSION

1. This is an important case that may affect the future of PMB not only in California, but also in the 18 other states that employ PMB systems either exclusively or in combination with other methods for determining AFDC payments. See Congressional Research Service, United States Library of Congress, *Administration of the AFDC Program—A Report to the House Committee on Government Operations* 118-119 (1977) (hereinafter cited as "CRS Report"). The state court's opinion is ambiguous, however, in its explanation of the extent to which it relied on federal statutes, federal regulations, and state law in arriving at the conclusion that PMB is unlawful.

We believe that the court of appeal erred in holding that the PMB system violates federal AFDC regulations. The Secretary has determined that PMB is compatible with the federal regulations cited by the state court (Pet. App. 19-22), and the Secretary's interpretation of his own regulations is entitled to deference. See, *e.g.*, *Northern Indiana Public Service Co.* v. *Walton League*, 423 U.S. 12, 14-15; *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414; *Ehlert* v. *United States*, 402 U.S. 99, 104-105. Neither the regulation requiring state plans to consider "currently available resources" in determining AFDC benefits (45 C.F.R. 233.20(a)(3)(ii)(D)) nor the regulation governing recoupment of prior AFDC overpayments (45 C.F.R. 233.20(a)(12)(i)) was intended to limit the states' flexibility in devising accounting procedures most likely to produce accurate

AFDC payments. Yet the state court did not even mention the Secretary's explicit approval of PMB.

The Secretary has concluded that PMB is an efficient and desirable method of AFDC administration (Pet. App. 19).[3] California operates the largest AFDC program in the country. The PMB system has enabled the state to hold its errors in the distribution of benefits to a rate significantly below the national average. Moreover, experience has indicated that other budgeting procedures in use elsewhere respond no more rapidly to changes in nonwelfare income received by AFDC beneficiaries. We discuss these considerations, and the other reasons for our conclusion that PMB is an appropriate method, in more detail at pages 12-22, *infra*.

There is no conflict in judicial decisions concerning PMB, and ordinarily the Secretary could rectify any problem caused by an erroneous state court decision by the simple expedient of amending the federal regulations. New regulations could eliminate any controversy over the validity of the state's action by expressly approving the state's conduct or committing the subject matter involved to state discretion. Here, however, the state court's opinion leaves unclear whether amended regulations would be sufficient to answer the court's objections to PMB. Al-

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[3] Indeed, in 1975, the Secretary published a Notice of Proposed Rulemaking for a regulation that would have made a modified PMB system mandatory for all states participating in the AFDC program. 40 Fed. Reg. 36141. The regulation was never promulgated in final form.

though the court did not explicitly state that the California system violates a particular federal statutory provision, its broad language may easily be read to imply that regulatory changes alone would not be adequate to cure PMB's alleged infirmities. The court declared that PMB "is fundamentally at odds with AFDC policies and provisions" (Pet. App. 13) and produces results prohibited by "federal AFDC law and policy" (*id.* at 12).

The case is further complicated by the possible presence of an adequate state ground for the state court's decision. Respondents contended, *inter alia*, that PMB "contravenes California statutes setting minimum aid standards (Welfare and Inst. Code, § 11450) and limiting reductions of current grants to effect recoupment for prior overpayments (Welfare and Inst. Code, § 11004)" (Pet. App. 6). The court of appeal did not discuss the former provision, but it apparently concluded that, under certain circumstances, PMB violates § 11004(e). The court focused on the consequences of the PMB system for AFDC beneficiaries whose nonwelfare income first increases significantly and then returns to its previous level. In the court's view, PMB first generates AFDC "overpayments" to such recipients and then automatically recovers such "overpayments" without regard to the recipients' financial status at the time of the recovery.[4] This aspect of PMB, the

[4] In payment months immediately following the increase in nonwelfare income, AFDC benefits will not diminish because they will be calculated on the basis of nonwelfare income in

court decided, is inconsistent with the recoupment limitations in Cal. Welfare and Inst. Code § 11004(e) (West 1972) and also with the similar limitations in 45 C.F.R. 233.20(a)(12)(i)(A)(*1*).

The state court's characterization of PMB as a method for recouping AFDC "overpayments" is inaccurate (see pages 19-22, *infra*). But it is impossible to determine from the state court's opinion whether that court would have reached its result on the basis of state law alone. The court's conclusion that PMB determines AFDC payments by considering income other than "net income available for current use" and thereby violates 45 C.F.R. 233.20(a)(3)(ii)(D) may have been dispositive because, if the court had been persuaded that PMB is a permissible procedure for computing AFDC benefits, it might not have ruled that PMB is an illegal tool for the recovery of AFDC "overpayments." But the court did not exclude the possibility that state law alone would have supported its decision. Because the validity of the PMB system is an important question, ultimately in need of definitive resolution, this Court should grant the petition, vacate the judgment, and remand for further proceedings to identify the basis of the

months before the increase. Likewise, in payment months immediately following the return of nonwelfare income to its earlier level, AFDC benefits will not rise, because they will be calculated by reference to months during which increased amounts of nonwelfare income were still being received. Thus, in some months, the total of AFDC payments and nonwelfare income will be higher than the maximum aid allowable and in other months it will be lower.

state court's decision. See *Minnesota* v. *National Tea Co.*, 309 U.S. 551; *Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194; *California* v. *Krivda*, 409 U.S. 33; *Paschall* v. *Christie-Stewart, Inc.*, 414 U.S. 100; *Philadelphia Newspapers, Inc.* v. *Jerome*, No. 77-308, decided January 9, 1978.

2. Because the issue presented by this case is important and likely to recur, we briefly discuss the governing legal principles even though we do not suggest that the Court undertake plenary review at the present time.

a. Section 402(a)(7) of the Social Security Act of 1935, as amended, 42 U.S.C. (Supp. V) 602(a)(7), provides that "[a] State plan for aid and services to needy families with children must * * * provide that the State agency shall, in determining need, take into consideration any other income and resources" of persons claiming AFDC benefits. The statute, however, says nothing about the frequency with which such other income should be reported or the proper correlation between an income measurement period and the date of the corresponding assistance payment.[5] Similarly, federal regulations contain no periodic income reporting rules and no requirement that the amount of AFDC benefit checks be calculated by reference to other income received during a particular interval. The regulations simply require state AFDC plans to "[p]rovide that, in determining need and the amount of the assistance payment, * * * net income available for current use and currently available resources shall be considered" (45 C.F.R. 233.20(a)(3)(ii)(D)). The Secretary has determined that the California PMB system is a permissible method for assessing "income available for current use and currently available resources" (Pet. App. 19-22).[6]

There is substantial variation among the income reporting and accounting practices adopted by state AFDC plans.[7] The divergent approaches manifest the considerable independence retained by the states in their administration of the AFDC program. Twelve states use PMB exclusively in computing AFDC benefits, and six others use a combination of PMB and

[5] Contrast, for example, the Supplemental Security Income program covered by Title XVI of the Social Security Act, as added, 86 Stat. 1465, and amended, 42 U.S.C. (Supp. V) 1381 *et seq.* Under Section 1602(c)(1), 42 U.S.C. (Supp. V) 1382(c)(1), "[a]n individual's eligibility for benefits * * * and the amount of such benefits shall be determined for each quarter of a calendar year * * *."

[6] The Secretary's position is consistent with the definition of "case error" employed in evaluating the efficiency of state AFDC programs. Under the Secretary's regulations, 45 C.F.R. 205.40(a)(2), (b)(2), a state will not be charged with a case error if it correctly adjusts an AFDC family's welfare payment not later than the second month after a month in which the family's income or other relevant circumstances change. Under this standard, California's PMB scheme, when functioning properly, does not give rise to case errors, because AFDC benefits paid in one month reflect income received two months earlier.

[7] For a complete survey of the state methods, see CRS Report 85-125 Part 3, "Income of AFDC Families: How It Is Reported and Measured."

some other accounting method.[8] CRS Report 118-119. California is one of only three states that require a monthly income report from each AFDC family, whether or not its circumstances have changed. CRS Report 87, 102.

The primary alternative to PMB is concurrent month budgeting (CMB). In a CMB system the AFDC payment for a particular month is based on an estimate of the amount of nonwelfare income that a family will receive during that month. This estimate is based on the family's past experience and on changes expected in the near future. The amount of the assistance payment equals the difference between the amount the family "needs" for the month (as determined by the relevant state need standard) and the estimated amount of nonwelfare income that the family will receive during the month. AFDC plans in 20 states use CMB either exclusively or in combination with other accounting methods (*ibid.*).[9]

Ideally, a CMB system would allow adjustments in AFDC assistance payments to be made immediately after a change in income has occurred or as soon as

[8] Cf. Section 5(f) of the Food Stamp Act of 1977, Pub. L. 95-113, 91 Stat. 963 (to be codified at 7 U.S.C. 2014(f)). This provision makes eligibility for food stamps dependent on anticipated income during the period for which eligibility is being determined and on income actually received during the 30-day period preceding the application for benefits.

[9] States that do not use either PMB or CMB base AFDC payments either on income expected in some future month other than the payment month or on a monthly average of income received during some two-month, three-month or six-month period in the past. CRS Report 107, 118-119.

a change is anticipated. Errors caused by erroneous estimates of future income would be corrected by a system instantaneously responsive to changed circumstances. Unfortunately, most states are not able to respond immediately to an AFDC family's change in income. Indeed, because most states do not require monthly reports by beneficiaries (CRS Report 102-105), many income changes are not discovered for several months. Even when unexpected changes in income are promptly reported, CMB systems normally cannot adjust assistance payments until the following month.[10] Processing delays may further postpone adjustments. Experience with different accounting systems suggests that PMB entails no significant loss in responsiveness and a considerable gain in certainty and simplicity.

A comparison of the AFDC performance in California and New York is instructive. Despite having the nation's largest AFDC caseload (469,000 families in fiscal year 1976, 13.3 percent of the national total), California achieved a 1975 combined case error rate (see note 6, *supra*) 29 percent below the national average. CRS Report 109, 129, 134. By contrast, New York,[11] with the second largest AFDC

[10] In a state that provides for payments twice monthly, an income change theoretically could be reflected in the next installment. As a practical matter, however, the time required for processing would make such a result unlikely.

[11] New York computes the amount of AFDC assistance on the basis of income expected in the month of initial or redetermined eligibility, plus that received in the four preceding weeks. Monthly income reports are not mandatory, and

caseload (372,000 families in fiscal year 1976, 10.5 percent of the national total), had a combined error rate 62 percent above the national average.[12] CRS Report 109, 129, 140. In addition, administrative costs of the AFDC program in California compare favorably with similar costs in New York. Summarizing recent case studies of the two states, the CRS Report noted (*id.* at 127):

> New York and California together make up over 40 percent of AFDC administrative costs in

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periodic report forms are not mailed to recipients. Recipients are expected to report changes in income or other family circumstances as they occur.

[12] The following table illustrates the California and New York records as compared to AFDC performance in the nation as a whole (CRS Report 141; footnote omitted):

AFDC PAYMENT ERROR RATES, UNITED STATES, CALIFORNIA AND NEW YORK, AMOUNT OF PAYMENTS ERRORS AS A PERCENT OF TOTAL PAYMENTS

	To Ineligibles (percent)	Overpayments (percent)	Underpayments (percent)
United States:			
January to June 1976	4.8	4.1	0.9
July to December 1975	5.5	4.7	1.0
April to September 1973	8.9	7.1	1.4
California:			
January to June 1976	2.3	2.7	.5
July to December 1975	2.5	3.6	.7
April to September 1973	6.9	5.4	1.4
New York:			
January to June 1976	7.1	5.9	2.2
July to December 1975	9.2	6.3	1.7
April to September 1973	16.7	9.3	1.7

> the country. In 1976, New York spent $230 million and California spent $206 million. Yet California has 100,000 more AFDC cases to administer than New York and reports 2½ times more applications processed. New York spent an average of $623 per AFDC case and California spent an average of $439 per case.[13] Yet in the January-June 1976 quality control review period, New York had an ineligibility rate of 9.9 percent, while California's was only 2.2 percent. In fiscal year 1976 New York paid out approximately $200 million erroneously per year while California paid out less than $80 million to ineligible and overpaid recipients.

Thus, California, using the PMB system, has enjoyed notable success in distributing AFDC benefits in the proper amounts to the proper recipients, and it has achieved that success at costs significantly less than those incurred by the next largest AFDC state program.

b. Disregarding both the Secretary's approval and the administrative advantages of California's accounting system, the state court found that PMB "is fundamentally at odds with AFDC policies and provisions" (Pet. App. 13). In reaching this result, the court relied on several decisions of this Court and other federal courts concerning the AFDC program. These earlier cases are not controlling here.

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[13] Even California's costs are significantly higher than the national average. In fiscal year 1976 the national administrative costs for the AFDC program were $1.07 billion. This sum covered 3,527,000 recipient families. CRS Report 129. The national average cost per AFDC case therefore was approximately $303.

King v. *Smith*, *supra*, *Lewis* v. *Martin*, 397 U.S. 552, and *Van Lare* v. *Hurley*, 421 U.S. 338, involved state AFDC regulations that treated non-parents as parents or conclusively presumed that certain non-parents would contribute to the needs of a welfare household, without any evidence that they had actually done so. Such regulations served to limit eligibility for or the amount of AFDC benefits on the basis of assumptions not necessarily borne out in fact.[14] This Court held that the state regulations

[14] The Alabama regulation reviewed in *King* provided that an "able-bodied man" who "cohabits" with a woman "is considered a substitute father" of all her children, whether or not he is actually their father, whether or not he is legally obligated to contribute to their support, and whether or not he contributes to their support (392 U.S. at 313-314). This "substitute father" provision made it impossible for certain children to show deprivation of parental support or care that had been caused by "death, continued absence from the home, or physical or mental incapacity of a parent * * *." See Section 406(a) of the Act, 42 U.S.C. 606(a).

The California regulation at issue in *Lewis* provided that AFDC payments to a needy child living with his mother and a man "assuming the role of spouse to the mother although not legally married to her" should be computed after consideration of the man's income (397 U.S. at 553-554). No showing that that income had been or would be used for the child's support was required. The California regulation thus reduced AFDC payments by taking into account resources not necessarily available for the needy child.

Similarly, the New York regulation reviewed in *Van Lare* reduced the shelter allowance for an AFDC family by a pro rata share whenever a non-paying lodger, by definition ineligible for welfare, lived with the family (421 U.S. at 341-342, 346-347). That is, if a family of four, entitled to an AFDC shelter allowance of $150, took in a non-paying lodger, its allowance would be reduced to $120. Such reductions were based on the assumption that the lodger would help defray the total cost of shelter for himself and the AFDC beneficiaries. This assumption was made without inquiry into the lodger's actual contribution, if any.

were inconsistent with the congressional goal of providing economic security for needy children deprived of parental support. *King* v. *Smith*, *supra*, 392 U.S. at 329-333; *Lewis* v. *Martin*, *supra*, 397 U.S. at 557-560; *Van Lare* v. *Hurley*, *supra*, 421 U.S. at 345-347. The Court concluded that the federal AFDC statute and regulations preclude the states "from assuming that nonlegally responsible persons will apply their resources to aid the welfare child" (*id.* at 347).

The PMB system does not involve any assumptions or presumptions. Benefits are based solely on income actually received by the welfare family. Indeed, the fundamental purpose of PMB is to avoid unwarranted assumptions about the amount of nonwelfare income that will be received by an AFDC family.

National Welfare Rights Organization v. *Weinberger*, 377 F. Supp. 861 (D. D.C.), and *Cooper* v. *Laupheimer*, 316 F. Supp. 264 (E.D. Pa.), cited by the California Court of Appeal, are likewise inapposite.[15] Those cases involved challenges to federal

[15] The third district court decision cited by the court of appeal, *Hagans* v. *Wyman*, 399 F. Supp. 421 (E.D. N.Y.), has been reversed, *Hagans* v. *Berger*, 536 F. 2d 525 (C.A. 2). The case involved a challenge to a New York AFDC regulation designed to prevent eviction of welfare tenants because of delinquent rental payments. The regulation permitted AFDC

and state regulations governing the recoupment of AFDC overpayments. The federal regulation at issue in *NWRO* and the Pennsylvania regulation at issue in *Cooper* both permitted recovery of previously paid excess AFDC benefits, without regard to the recipients' actual financial situation at the time of the proposed recovery. The regulations authorized recoupment without any showing that the beneficiaries still had the excess payments in their possession or that their actual financial circumstances would allow re-

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recipients who were facing eviction for nonpayment of rent to request an advance on their monthly shelter allowance. The regulation required the recipients to agree to reduction of their shelter allowance in equal amounts over the next six months to repay the amount of the advance allowance. The court of appeals correctly held that the advance allowance procedure is consistent with Title IV of the Social Security Act and does not violate the federal regulation precluding recoupment of AFDC overpayments unless the recipient has currently available nonwelfare income in the amount of the proposed recovery. See note 16, *infra*. In answer to an argument that the New York regulation conflicted with the federal recoupment regulation, the court stated (536 F. 2d at 532; footnote omitted):

> Since the State Regulation here authorizes the advance allowance, it cannot be properly characterized as an excess over the amount that *"should"* have been paid. "Overpayment" would seemingly connote a payment which was unintentionally made either through a mistake by the agency or through the mistake or fraud of the recipient. While the payments made here are in excess of the regular monthly grant, they were of course intentionally advanced at the written request of the recipient.

Similar reasoning applies here. Because respondents' AFDC benefits were precisely what they should have been under the PMB system, no overpayment, and hence no recoupment, was involved.

covery to proceed without causing hardship. The courts held the controverted regulations invalid because they presumed that earlier overpayments would still be available, when in fact the resources might have been exhausted.[16]

Again, the PMB system does not rest on such a presumption. Respondents were not overpaid under the California system, and no attempt was made to recover any overpayment. PMB is simply an accounting method designed to implement the regulatory requirement that AFDC payments be based on "net income available for current use and currently available resources." As the Secretary's delegate has explained (Pet. App. 21), a literal reading of the "currently available" language

> would mean that unless the individual has his total income in hand when the assistance check is issued (or maybe even received), that income may not be deducted in determining the amount of his grant. This would mean that the only time income could be counted would be when it was received at the same time the assistance check was issued (or received). Otherwise the agency would be counting income that the indi-

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[16] After the district court's decision in *NWRO*, the federal regulation governing recoupment of AFDC overpayments was changed. 45 C.F.R. 233.20(a)(12)(i)(A)(*1*) now provides that, except where a recipient has willfully withheld relevant information, "[t]he State may not recoup any overpayment previously made to a recipient * * * [u]nless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments."

vidual spent (or at least [had] begun to spend) and that was no longer available to him. This ridiculous result was clearly not intended by the regulation.

On the contrary, the regulation was intended to preclude the consideration of income that was, in fact, never available to the individual, or that had not been available to him for a substantial period of time.

AFDC benefits, computed under the PMB method, are based solely on income actually received during the "budget" month, which is two months before the "payment" month. Under the PMB system recipients should know that increases in nonwelfare income will be followed by reductions in AFDC benefits, and they can plan accordingly. By contrast, the regulation reviewed in *NWRO* provided for recoupment of overpayments made as much as a year earlier, and the Pennsylvania regulation reviewed in *Cooper* apparently mandated recovery of duplicate payments, no matter how long ago they had been made. The recoupment might come as a surprise, creating a substantial risk of hardship. That risk, against which the district courts sought to protect in *NWRO* and *Cooper*, is not present under the California PMB system to an extent even remotely comparable.

3. California's supplemental payment system serves to mitigate whatever problems may arise when nonwelfare income decreases. For the first two months after a decrease, AFDC benefits calculated under PMB will continue to reflect the previous, higher, level of nonwelfare income. Accordingly,

existing California regulations provide that "[i]f unusual and unforseen substantial changes in a recipient's income occur, a supplemental payment may be made when necessary to protect the welfare of the child(ren)" (Pet. 3; EASM § 44-315.8). In the aftermath of the state court's decision in this case, California has proposed new supplemental payment regulations that would make such payments mandatory whenever (i) "a family budget unit receives or will receive less net nonexempt income in the payment period than was computed from the corresponding budget period" and (ii) "[a]n emergency situation exists/will occur if the supplemental payment is not issued in that payment period." [17] Under the proposed regulations, supplemental payments must be issued within three days after a qualified recipient's request. In addition, the proposal would eliminate the current ceiling on the total amount of supplemental payments a single AFDC family could receive in more than one month (see page 4, *supra*). The potential practical disadvantages of the PMB system are substantially lessened by California's supplemental payment rules, and the proposed revision of those rules would diminish still further

[17] The quoted passages are taken from proposed EASM §§ 44-315.8 and 44-315.822. The California proposal is contained in a draft prepared by the current Director of the State Department of Benefit Payments and in a revised version of that draft reported in a February 17, 1978, letter from the Director to respondents' counsel. Copies of the original draft and the Director's letter have been lodged with the Clerk of this Court.

the possibility that PMB will cause temporary hardship for AFDC families.

The state court's decision is ambiguous concerning the efficacy of supplemental payments. After describing the shortcomings it saw in the PMB system, the court commented that California's supplemental payment regulation "is designed to alleviate the problem and is not mandatory" (Pet. App. 12). The court continued, "We emphasize this point because it is believed that Prior Month Budgeting is a helpful and, if properly applied, reasonable method for computing welfare grants. The *regulation* should be amended so as to provide payments to protect the children. If this were accomplished, the PMB system would then comply with federal regulations" (*ibid.*). Another portion of the opinion, however, seems to take exactly the opposite position, stating: "The vagaries in the existing PMB system, apparent in such cases as those of [respondents], cannot be alleviated simply by the application of an emergency payment or supplement payment provision" (*id.* at 14).

The California Attorney General's office has informed us that, in reliance on the first excerpt from the state court's decision, California has retained its PMB system and has attempted to respond to the court's concerns through liberalized use of supplemental payments, soon to be reflected formally in the revised regulations described above. Whether the state's action will satisfy the California courts is not clear. We are advised that the sufficiency of the revised supplemental payment regulations will be considered in further state court proceedings scheduled to occur in the near future. The uncertain outcome of these proceedings, combined with the possibility that the state court's decision rested on an adequate state ground (see pages 10-11, *supra*), makes it inappropriate for this Court to undertake plenary review. The Secretary regards PMB as an efficient tool of AFDC administration that is fully compatible with federal law and regulations. Preservation of the PMB system in California is important to the continued successful operation of the nation's largest AFDC program. But, for the reasons we have discussed, a remand for clarification of the basis of the state court's decision is the appropriate course here.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded to the court of appeal for further proceedings to determine whether the state court's decision rested on an adequate state ground.

Respectfully submitted.

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